89- 1490
NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

EVELYN MARINO, et. al.,

Petitioners,

v.

JUAN U. ORTIZ, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED
DEC 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

I. QUESTIONS PRESENTED

1. Whether the denial of equal protection of the laws suit of non-consenting employees should be dismissed as an impermissible collateral attack if the employer claims to act pursuant to a consent decree which contemplates race conscious employment decisions, when those non-consenting employees were not parties to the litigation.

2. Whether the denial of a motion for a rehearing in the circuit court pursuant to Federal Rules of Appellate Procedure, Rule 40, of the affirmance of the dismissal of the Petitioners' complaint alleging denial of equal protection of the laws claims presents an intolerable injustice when the dismissal was based on the fact that the Petitioners did not intervene in the Title VII litigation which generated the consent decree,

3. Whether Petitioners, who had timely made an application for a rehearing of a 4-4 decision in this court, which was denied, should or could have made a consecutive application for a rehearing in this court on the basis of the after-decided case of Martin v Wilks, 109 S.Ct. 2180, in contravention of Supreme Court Rule 51.4.

II. PARTIES

SUPREME COURT OF THE UNITED STATES

EVELYN MARINO, et. al.,

Petitioners,

v

JUAN U. ORTIZ, et. al.,

Respondents.

(full list of parties in footnote)

1. Footnote.

Footnotes
1.

Caption: Marino et al v Ortiz et al.

EVELYN MARINO, ARTHUR J. ROTELLA, THOMAS RUSKIN, JOHN RUSSO, PATRICK RUSSO, BARNEY RYAN, THOMAS J. RYAN, MICHAEL RYDER, WARREN SAM, JOHN SASSANO, MEL SCHWARTZ, HERBERT SEIGAL, JAMES SMITH, ANN SOWINSKI, WILLIAM SPISAK, STANLEY TATAR, DENNIS TERMINELLO, JILL TOMCZAK, CHARLES TORANO, CATHERINE VOLPE, WALTER P. VOSS, ROBERT WAGNER, WILLIAM J. ZAZECKIE, THOMAS MOSS, THEODORE MCHUGH, JOSEPH NICOLOSI, KENNETH OTTEN, LOUIS PIOLI, TADGH D. MCNAMEE, TERRANCE MCCABE, DAVID PANETTA, CHRISTOPHER HAGGERTY, JAMES G. SCHNEIDER, THOMAS P. KELLY, FLORENCE CIAFFONE, KEVIN SWEENEY, HOWARD ALLEN, GARY BERMAN, STEVEN CAIRO, JOSEPH CONCANNON, MICHAEL CONOLLY, MAURICE DEVITO, ARTHUR FLYNN, RAYMOND GALLAGHER, KEVIN GRASSING, JAMES C. KELLY, KEVEN KUBICK, ROBERT B. LANGER, HENRY MAHNCKE, JOHN MARCONE, JOHN MAZZOCCHI, PATRICK MCGINNIS, SERGIO MIKULUS, KENNETH NILSEN, ALAN R. OSTOITS, HENRY PALAYO, ANTHONY REITANO, ROBERT A SOWINSKI, JOSEPH TORRAGROSA, RICHARD SEVERI, RUBIN RIVERA, ALAN MAY, MARC WOLF, WILLIAM SAUNIER, ANTHONY P. CONTENTO, DOMINICK PETRUCELLI, FREDERICK TERMINI, KEVIN RYAN, MORTON ADLER, RICHARD J. ANGLEY, ROBERT ALS, ALBERT ASCOLESE, POMPEO J. BASILE, LAWRENCE G. BLUMENTHAL, KEVIN BOSHELL. KEITH BRINKMANN, DANIEL BUCKLEY, JOHN J. CARNEY, JOSEPH CASELLA, HARVEY CHARYM, ROBERT CHILLE, GERALD CHIRICO, JOHN CONNOLLY, FRANK CORSELLI, GARY DAVIS, EDMOND J. DECIO, ALEXANDER A. DEFRANCIS,

NICHOLAS DIMURO, JAMES DONOHUE, WILLIAM ERDOGAN, NATHAN FISHMAN, PHILIP FRANCHINA, CLAIRE GALLAGHER, CARL GANDOLFO, JOHN P. GERRISH, DANIEL GRASSER, RONALD V. GRECO, GEOFFREY HART, JOHN HOLZE, RICHARD HOOVER, ROBERT IOVINO, JOHN JOHNSON, CRAIG JUDGE, KEVIN KAUFMAN, KIERAN KELLY, DANIEL KELLY, TIMOTHY KELLY. PATRICK J. KENNY, KEVIN KIRBY, FRAN KRIPINSKI, FRANK KIRBY, FRANCIS X. LAVELLE, ANTHONY LONGHITANO, JAMES LUONGO, DENNIS MC CABE, JOHN J. MCCANN, KEVIN L. MCDONALD, THOMAS MCDONALD, STANLEY MELTZER, RALPH MARCHITELLI, EVELYN MOONEY, GEORGE MORAN, JAMES MOREIN, KEVIN MULLEN, BRUCE MURPHY, MICHAEL D. NEMOYTEN, DANIEL P. O'NEILL, JOSEPH OPROMALLA, FRANK R. PAGANUCCI, EDMUND PEDERSON, JOSEPH PICARELLO, RONALD POLIS, GERALD POPE, ALAN PRESCOTT, ROBERT PYTEL, GERARD W. RODMAN, WILLIAM ROMANO, LOUIS ROSARIO, JOHN E RIVERS, GEORGE S. REYNOLDS, SAMUEL P. REIVER, EILEEN REGAN, ANGELO GRANIERO, ROBERT EDWARDS, THOMAS J. GULOTTA, RICKY KARPEN, KEVIN KEENAN, DAVID CHONG, WILLIAM DWYER, EDWARD HARVEY, MARY LONGWORTH, BENJAMIN CONFORTO, ANTHONY PAULINE, GARY M. KATZ, GEORGE J. MEYER, BARRY GOLDBLATT, ROBERT TOBUCK, FRANK BERGSTOL, JOSEPH BLANC, MARTIN CONNOLLY, LOUIS CURCURUTO, BERNARD WHALEN, VINCENT GIAMMUSSO, MICHAEL ARCARI, MICHAEL KELLY, HARVEY D. FEIT, JOHN ENGLISH, LOUIS GRECO, ROBERT LYNCH,WILLIAM CASEY, DAVID KAISER, THOMAS KELLY, RAYMOND DUFRESNE, ROBERT DEAN, JOHN MURPHY, JOHN FEENEY, JAMES MOOD, NICHOLAS LIMONCELLI, TODD FISHER, EDWARD SCOLAVINO, HAROLD

ROBINSON, BRIAN DAILY, EDWARD KULESA, A.P. CASANO, JOSEPH BROUSSEAU, RICHARD GWILLYM, JOHN NICKELS, RICHARD KLEINER, EDWARD PAROULEK, EDWARD W. SOLOMONIK, JOSEPH A. AVERSO, RONALD SHINDEL, HARVEY GRAPE, VINCENT J. GIANTASIO, PETER R. MALVASIO, MICHAEL A. GLASSER, ARTHUR PEASLEE, JOSEPH BUFFOLINO, MICHAEL TRIMIS, GEORGE KOEHLER, JOHN GEARY, DANIEL KORNBLUM, NICHOLAS BALZOMI, ANDREW FOPPIANO JAMES CURRY, LOUIS VINGELLI, WILLIAM M. BURYK, ANDREW SOVIA, JOSEPH K. MONAHAN, FRANCIS CUSH, WARREN MOLINO, JOSEPH J. GIACOPPO MICHAEL CAMPBELL, DANIEL COLLINS, JERRY WOJCIK, ROBERT TARIGO, ANGELA AMATO, GUY CASTELLANO, WILLIAM COYNE, LAURA DINAPOLI, MICHAEL A. GIACOPPI, HENRY GROSS, JOHN KLOEPPING, WILLIAM MCNAMARA, RANDALL MAYER, ROY W. POPPLE, JOHN SCOLARO, JOHN L. MELILLO, RONALD BRADLEY, DOUGLAS BRANDT,THOMAS MCGOVERN, ROBERT N. PETERS, ROBERT PEYER, ROBERT RENOLDS, EDWARD J. SMITH, NORMAN G. DONOGHUE, ROBERT TOOHEY, DONALD SKUZA, JERRY SALTZMAN, CHRISTINE LEGROTTAGLIE, DENNIS EMPEROR, JOSEPH STABILE, STEPHEN FAJFER, ROBERT WILLMARTH, GARY A. TIBALDI, JAMES A. CIACCIA, JOHN FITZGERALD, CHRISTOPHER T. BUCKLEY, RONALD BETTERLY, ARTHUR KAPLAN, EDWARD F. BRAJCZEWSKI, JOHN YUNKNES, BRIAN HOGAN, FRANK PANARESE, JOHN GURTOWSKI, DIANNE BROCCOLI, ANTHONY LOMBARDO, PAUL CALANDRO, WILLIAM KINZLER, JAMES CHRISTOPHER, JR., NICHOLAS R. BATTISTA, WILLIAM SEYCHELL, WILLIAM DUNPHY, TIMOTHY CONNOLLY, JOSEPH PASTORINO, MICHAEL MCGOVERN, THOMAS HATCH, ROLAND CAPUANO, DOMENICK CANALE, THOMAS CALLAHAN,

THEODORE WESS, STEPHEN KURZ, EDITH LINN, DARRYL BERGER, KARL GABRIELSEN, CONNIE PHELAN, THOMAS IACOPELLI, JAMES MARTIN, FRANK MANDILE, MARY MARUFFI, JAMES O'REILLY, GILBERT EATON, THOMAS KENNEDY, ELLEN HALE, DANIEL BOYLAN, RICHARD MILTENBERG, KEVIN O'KEEFE, ROBIN BIRNBAUM, FRANK FORTE, MICHAEL PASQUALE, MARTIN RODDINI, ANTHONY CELANO, CHARLES MARTIN, SALVATORE BUSCEMI, ROBERT AHERN, STEPHEN BRODY, CHRIS ATHANASOPOULOS, BILLIE RIVERA, KAREN RUBINO, MICHAEL DEMARFIO, RAYMOND MARDINEY, JOHN HOLUB, JOHN TOLEDO, JOHN WYNNE, MICHAEL FISCINA, ROBERT SPITZER, KENNETH ROBERTS, ROBERT CLANCY, ROBERT NAPOLITANO, LEE POJE,

Petitioners

v.

JUAN U. ORTIZ, PERSONNEL DIRECTOR OF THE CITY OF NEW YORK, BENJAMIN WARD, POLICE COMMISSIONER OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents

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Hansberry v Lee,, 311 US 31 (1949): 20

Hispanic Society v New York City Police Department, 806 F.2d 1147 (2d Cir. 1986), aff'd sub nom Costello v Ortiz, 108 S.Ct. 586 (1988): 7,11,15,22,23,25,

Huddleston v Dwyer, 322 U.S. 232 (1944): 16

Marino v Ortiz, 806 F.2d 1144 (2d Cir. 1986); aff'd by equally divided court 108 S.Ct. 586 8,11,22,23,24,

Martin v Wilks, 109 S.Ct. 2180 (1989): 9,10,11,12,13,15,16,17,21,26.

Parklane Hosiery v Shore, 439 US 322: 20

Reeves v Wilkes, 754 F.2d 965 (11th Cir. 1985): 16,

United States v Middlebrooks, 624 F.2d 36 (5th Cir, 1989): 16

W. R. Grace & Co., v Local 759, 461 US 757 (1983): 20

Statutes

42 USC 1983: 6,8,11,12,15,19,20,23,24,26.

42 USC 2000e: 6,16,19,20

Supreme Court Rule 51.4: 9,10,12,13,14,.

Federal Rules of Appellate Procedure, Rule 40: 14,15, 21,

Federal Rules of Civil Procedure, Rule 19: 19,25,

Federal Rules of Civil Procedure, Rule 24: 8,11, 19,22,

New York Constitution, Art. V. Sec. 6, 17,

IV. OPINIONS BELOW.

Marino v Ortiz, (File No. 85 Civ. 60068 [RLC] SDNY, 1986, n.o.r) reproduced at A63; aff'd, 806 F.2d 1144 (2d Cir. 1986) reproduced at A8, aff'd by an equally divided court 108 S.Ct 586 (1988); petition for rehearing denied, 108 S.Ct 1064 (1988); Rule 40 FRAP petition for rehearing denied ___ F.2d ____ (2d Cir. Oct. 16, 1989) reproduced at A1.

Pursuant to Rule 21(k) (ii) the following decisions below of a companion case, not on review herein, Hispanic Society v The Police Department of the City of New York, 84 Civ 6628, SDNY 1986, 40 Emp. Prac. Dec (CCH) 36385, reproduced at A43 aff'd, 806 F.2d 1147 (2d Cir. 1988), reproduced at A21,aff'd sub nom Costello v The New York City Police Dep't., 108 S.Ct 586 (1988).

V. JURISDICTIONAL STATEMENT

2d Cir. rehearing denied Oct. 16, 1989.

Jurisdiction is conferred by reason of 28 USC 1254, and Supreme Court Rule 17(a),

(c), in that (a) the federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, Reeves v Wilkes, 754 F.2d 965 (11th Cir. 1985) and in conflict with this court in Martin v Wilks, ___ U.S. ____, 109 S.Ct. 2180, (June 12, 1989) and has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, and (c) the federal court of appeals has identified in its opinion important questions of federal law which should be, settled by this Court. The complaint in the district court was founded on 42 USC 1983. (A76).

VI. CONSTITUTION & STATUTES CITED.

Pursuant to Rule 21 (1) (f) the texts of the following are set forth in the appendix starting at A155:

42 USC 1983 A157

42 USC 2000e A157

Fed. Rules App. Procedure, Rule 40 A159

Fed. Rules of Civil Procedure Rules 19 and 24. A155-156

New York Constitution, Art. 5 Sec. 6. A155

VII. STATEMENT OF THE CASE

This action was commenced December 30, 1986. in the U.S.District Court for the Southern District of New York. The complaint was brought pursuant to 42 USC 1983. (A76) It was alleged that the petitioners, police officers who outcompeted other candidates in a sergeant promotional examination were excluded from consideration for promotion while some those outcompeted candidates were promoted to sergeant.

Prior thereto certain Title VII, Civil Rights Act of 1964, (42 USC 2000e et. seq.)

litigation had been instituted by minority employees who took the same examination and who were perceived by the city of New York to have failed the examination. That suit, Hispanic Society v New York City Police Department, 806 F.2d 1147, (2d Cir, 1986), aff'd sub nom Costello v Ortiz, 108 S.Ct. 586 (1988) (per curiam), had generated an agreement of settlement pursuant to which the minority employees were promoted to sergeant. Petitioners neither intervened in that action nor were they joined by the litigating parties or the court. They had, as part of a group of objectors (the "Costello" objectors) submitted objections to the settlement before the same judge who was on their Marino case. (A124).

A motion to dismiss the suit (A97) was granted by the district court on April 29, 1986, (A63) and the dismissal was affirmed December 8, 1986 by the 2d Circuit Court of Appeals (A8) which held that the

Petitioners' 42 USC 1983 suit was an "impermissible collateral attack" on the Hispanic settlement and that there was a requirement of mandatory intervention under Rule 24 which was not met thereby justifying the dismissal. Marino v Ortiz, 806 F.2d 1144 (2d Cir. 1986). (A8). The court of appeals simultaneously decided Hispanic Society v New York City Police Department 806 F.2d 11 (A21) which was an appeal by objectors at the fairness hearing, sub nom "Costello Petitioners", which included the Marino petitioners herein, which held that objectors who are not parties have no standing to appeal from the consent decree.

In January, 1988, this court rendered an equally divided decision respecting the Marino complaint dismissal thereby affirming the circuit court, and affirmed the dismissal of the Costello appeal. This court also denied a timely petition

or a rehearing under Rule 51.4. 109 S.Ct. 86, rehearing denied, 1064 (1988).

On June 12, 1989 this court decided artin v Wilks, 109 S.Ct. 2180 (1989) which ejected the concept of "mandatory ntervention" under Rule 24 and the concept f "impermissible collateral attack" by on-consenting and non-joined aggrieved ersons.

On June 16, 1989, because of the fact hat this court does not take successive applications for rehearings under Rule 51.4, , Petitioners moved for a rehearing before the circuit court under FRAP Rule 40 based upon the holding in Martin v Wilks, supra. (A64). The motion was denied October 18, 1989. The denial was based on the grounds that there had been no showing of intolerable injustice. (A1) The circuit court in the last paragraph of its decision cited three questions respecting whether the application for rehearing

should have been made to this Court, whether the 4-4 decision by this Court was the "law of the case" and whether Martin v Wilks is to be applied retroactively. (A7)

This petition for certiorari is from the denial of the application to the court of appeals for the rehearing. It is not a successive petition for a rehearing under Rule 51.4 of this court, and hence unlike the restrictions of Rule 51, all members of the court can rule on this Petition. The petition is based upon the assertion that there was an intolerable injustice caused by the application of "mandatory intervention" and "impermissible collateral attack" concepts: and that the court of appeals was in error in not taking the opportunity to rectify the misapplication of "mandatory intervention" and "impermissible collateral attack" concepts which effectively denied Petitioners any substantive hearing of the complaint on the

rits.

II. REASONS FOR GRANTING THE WRIT.

The original decision of the court of ppeals had held that the Petitioners were equired to intervene in the Title VII ispanic action under the concept of mandatory intervention", under FRCP Rule 4, and that their 42 USC 1983 action was n "impermissible collateral attack". This ourt affirmed by an equally divided court nd denied a timely motion for a rehearing. arino v Ortiz, 806 F.2d 1144 (2d Cir. 986) aff'd by an equally divided court, 08 S.Ct. 586, petition for rehearing enied 108 S.Ct. 1064 (1988).

On June 12, 1989 this court decided Martin v Wilks, ____ U.S. ____, 109 S.Ct. 2180, (1989) which rejects the concept of FRCP mandatory intervention and the concept of impermissible collateral attack, as a basis for dismissing a separate suit by non-consenting and non-joined persons who

perceive themselves aggrieved by the results of the implimentation of a consent decree. The complaint in this action was filed after the complaint in Martin v Wilks had been instituted. Here the Petitioners chose 42 USC 1983 as the vehicle by which to seek vindication of their perceived denial of equal protection of the laws claims.

Four days after the Martin v Wilks decision the Petitioners moved in the circuit court pursuant to FRAP Rule 40 for a rehearing based upon that decision. This Court's Rule 51.4 prohibiting successive rehearing applications was specifically brought to the attention of the Second Circuit in the motion FRAP Rule 40 motion for a rehearing in that court. (A64,74).

The court of appeals in the last paragraph of its opinion denying a rehearing identified three troublesome questions of national importance which

should be addressed by this Court for the guidance to the courts and the bar, respecting whether this court takes consecutive applications for rehearings, whether the 4-4 affirmance of this court constituted the "law of the case" and whether Martin v Wilks is to be retroactively applied. (A7). The court did not answer these questions because of the denial of the application on the perceived lack of intolerable injustice and and that it believed in the finality of judgments. (A6). The original judgment of dismissal had not been on the merits.

A. Should Petitioners have made the motion for rehearing before the Supreme Court.

Pursuant to Rule 51.4 of this court there is no authority to reapply for consecutive applications to this court for a rehearing, a fact made know to the court of appeals in the moving papers. The court was further informed that there was no such

impediment to the application to it under FRAP Rule 40. (A67). The instruction of this court on granting certiorari should be in the negative as such reapplication would be in specific contravention of the clear terms of Rule 51.4. Moreover even were successive applications authorized, since a remedy was available under FRAP 40, it would be a more congenial to good practice and beneficial to the strained resources of this court to make the application in the circuit court whose claimed and demonstrable error is sought to be corrected.

This petition for certiorari is not a petition for a rehearing in this court. It is a petition for certiorari to the court of appeals from its denial of a FRAP Rule 40 motion for a rehearing of its decision. As it is not a Rule 54.1 petition, all nine justices of this court have authority to rule upon the petition for a writ of

rtiorari.

B. Law of the case.

The second question posed in the last ragraph of the decision below was whether e 4-4 decision of the court of appeals cision is "the law of the case". (A7). e dismissal was based solely on the jected view that FRCP Rule 24 required andatory intervention" in Hispanic (A38). there was no substantive hearing on the erits by reason of the misapplication of roc·dural and due process concepts, this urt should answer the question in the gative.

C. Is Martin v Wilks, Retroactive.

The complaint in this case as served fter the Martin v Wilks case was nstituted.

Unless a person is joined as a party to he litigation the results of that itigation are not binding on him and he an maintain the 42 USC 1983 action. See:

Reeves v Wilkes, 754 F.2d 965 (11th Cir. 1985), decided before the service of summons in this case and which is in accord with this court's after decided Martin v Wilks case. Moreover, because the substantive legislation had not changed, the Petitioners had a right to conclude that the prior institution by others of a Title VII of the Civil Rights Act of 1964, 42 USC 2000e et seq., did not limit, repeal or otherwise negate the action available under 42 USC 1983 to persons, not parties to that action.

The circuit court in the past had granted extension of time under FRAP Rule 40 after the mandate had issued, and cited Davis v Smith, 607 F2d 534, 540 (2d Cir 1979) It also cited Huddleston v Dwyer, 322 U.S. 232, 236 (1944); United States v Middlebrooks, 624 F.2d 36, 37 (5th Cir. 1989) and Brenna v Federal Carteridge Corp., 174 F.2d 732, petition for rehearing

granted 183 F.2d 414 (8th Cir. 1950). as instances where the petition had been entertained.

D. Manifest or intolerable injustice.

The circuit court asserted that, "Movants have made no showing of a manifest or intolerable injustice." (A6). The procedural injustice of dismissing a complaint as an "impermissible collateral attack" and attempting to bind Petitioners to a consent decree in an action in which they neither intervened nor were joined has already been decided by this court in Martin v Wilks, supra. The substantive manifest and intolerable injustice is the fact, argued in all courts which heard this case, that New York Constitution, Art. V. Sec. 6, requires that promotions to civil service positions be upon merit to be determined by competitive examinations. That is the definition of equal protection of the law in New York which has been

implicated here. The Petitioners competed against others in the same examination. Persons against whom they competed have been promoted to sergeant who scored as well as or lower than the petitioners. Petitioners have not been considered for promotion and are subject to being supervised by person whom they outscored on the same competitive examination. (A81, 124,149)

What makes this state of affairs a particularly intolerable injustice is the fact that there were still over 400 vacancies with 30 to 60 accruing each month after the promotion of the lower scoring beneficiaries of the settlement. There had been no later examination and no other list of eligibles was in existence. Thus the racial remedy employed was not narrowly tailored to prevent the unnecessary exclusion of those who outcompeted the beneficiaries of the settlement. No one

would have been demoted or displaced had the petitioners prevailed in their action, once they had been permitted to have a substantive hearing on the merits of their complaint. (A143-146, 151).

The court of appeals also denied the application for a rehearing as "**nothing more but an attempt to reopen a final judgment because of a subsequent change in the law. When we take the interest in finality of judgments, particularly those as old as the instant matter, into account we perceive no persuasive reason to reopen this matter." (A6).

There has been no "change in the law" either procedurally or substantively. An examination of FRCP Rules 19 and 24 reveal that there has been no "change in the law" and the clear texts thereof have remained the same before, during and after the actions below. In the substantive sense, 42 USC 1983 and 42 USC 2000e et seq. remain

the same. There was and is no provision in 42 USC 2000e which delimits, prohibits or otherwise repeals either directly or by implication the longstanding availability of a plenary action under 42 USC 1983 to pursue claims of denial of equal protection of the laws.

Moreover, this court had previously and specifically held that the binding of nonparties to the provisions of a court decree violated fundamental notions of due process in such cases as Hansberry v Lee, 311 U.S. 31 (1949); Parklane Hosiery v Shore, 439 U.S. 322 n.7 (1979); and W. R. Grace & Co., v Local 759, 461 U.S. 757 (1983). In Chase National Bank v City of Norwalk, 291 U.S. 431 (1933) this court held that persons not parties to litigation do not have an affirmative duty to intervene in litigation to which they have not been joined by the existing parties.

The complaint was filed in the district

court December 30, 1985 and was dismissed by the district court as an "impermissible collateral attack" four months later on April 29, 1986 (A62). All appellate procedures to rectify this error have been expeditiously pursued. On June 16, 1989, just four days after this court decided Martin v Wilks, supra, the motion for leave for a rehearing was made pursuant to FRAP Rule 40. The circuit court took four months to decide the the motion on October 18, 1989. Thus the period of time necessary to correct the error should not be charged to the age of the case to Petitioners' detriment. Substantively speaking, this case is only five months old, and was started years after the Martin v Wilks case was instituted.

The observation of the court of appeals that "***Indeed, they were fully aware of the proceedings leading up to the consent decree in question, and viewing the

proceedings as a whole, it is evident that this collateral attack was necessitated in part by their counsel's mistaken belief that they were parties to the class action. See Hispanic Soc'y., 806 F.2d at 1152-53***", (A6-7), seems to be in contradiction with the circuit court panel's assertion in its same cited opinion that "Appellants' predicament results from their steadfast refusal to comply with the requirements for intervention set forth in Fed. R. Civ. P. 24." (A38). As has been stated, there is no mandatory intervention requirement in FRCP Rule 24. Attempting to bind Petitioners who neither intervened nor were joined is a violation of basic due process of law.

Evidence that the circuit court was incorrect can be drawn from the record in the case Hispanic sub nom Costello et al v City of New York, et al, in this court joined with Marino v Ortiz, in this court.

he petition therein as well as the briefs nd joint appendix are on file with the ourt. Petitioners' complaint in Marino as specifically founded in par. 1 upon 42 SC 1983. (A76).

The same counsel represented a group of on-joined and non-intervening objectors "Costello objectors") in Hispanic, which ncluded all of the Marino plaintiffs. Both Marino and Hispanic were before the same judge at the same time. (A148-154) In his objection papers in Hispanic counsel stated: "***To the degree that the settlement orders define defendants as all city employees the Responding Police Officers have standing to seek modification of, object to or otherwise comment thereon." (A126-127). Further in the same document counsel stated: "***Nothing herein is to be construed to be in lieu of or by way of diminution of the case of Marino et al v Ortiz, et al, 85 Civ 10068 (RLC),

currently before this Court. The comments herein are made lest failure to timely to do so be perceived as consent to the content or impact of the settlement." (A128-129). These observations were made to avoid any question that the petitioners were thereby asserting a claim of denial of equal protection of the laws under the 42 USC 1983 action in Marino.

Further counsel for Petitioners specifically stated at the objector hearing that "***I have cast all of my papers in this case and in the Marino case on the grounds that such a procedure violates equal protection of the laws which is a constitutional mandate superior to Title VII.***" (A150). Further, in opposition to the motion in the district court to dismiss the complaint as an "impermissible collateral attack", petitioners' counsel observed that "***Defendants have no authority to seek by this motion to rewrite

the complaint of the plaintiffs and to make a racial issue out of a pure Equal Protection of the Laws standing.**" (A115-116)

These assertions advanced early in the litigation provided a generous abundance of evidence upon which the litigating parties in Hispanic could conclude that, pursuant to the terms of FRCP Rule 19, a claim which could lead to inconsistent results was being asserted, thereby triggering the obligation of the parties in Hispanic or the court to join the Petitioners to the litigation if the parties wished the Petitioners to be bound by the decree in Hispanic.

Moreover the practical result of the dismissal caused a substantive determination that a prior Title VII action mounted by others, somehow repealed, limited or otherwise impaired the right of persons not parties thereto to institute a

42 USC 1983 action to exonerate perceived claims of deprivation of equal protection of the laws by persons acting under color of state authority. Such concept, as well as the concepts of "mandatory intervention" and "impermissible collateral attack" are but unwarranted exercises in judicial legislation which have perpetrated a gross injustice here.

IX. CONCLUSION

The petition for a Writ of Certiorari should be granted and the circuit court should be summarily reversed on the authority of Martin v Wilks.

November 25, 1989.

Respectfully submitted:

Ronald Podolsky
Attorney for Petitioners.

A P P E N D I X

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1988
Submitted June 16, 1989
Decided: Oct. 18, 1989 Docket No 96-7347

EVELYN MARINO, et al.,
Plaintiffs-Appellants,

v.

JUAN U. ORTIZ, et al,
Defendants-Appellants.

Before: Feinberg, Winter, and Mahoney, Circuit Judges.

Motion for an enlargement of time in which to file a petition for rehearing under Fed. R. App. P. 40. Denied.

Ronald Podolsky, New York, New York for Plaintiffs-Appellants.

PER CURIAM: Movants seek an enlargement of time in which to file a petition for rehearing under Fed. R. APP. P. 40 in light of the Supreme Court's decision in Martin v Wilkes, 109 S.Ct. 2180 (1989).

We deny the motion.

We decided the instant case, Marino v Ortiz, 806 F.2d 1144 (2d Cir. 1986), and a companion case, Hispanic Soc'y v New York City Police Dep't, 806 F.2d 1147, (2d Cir. 1986), The Supreme Court affirmed our decision by a 4-4 vote slightly over a year later, See Marino v Ortiz, 108 S.Ct. 586 (1988) (per curiam), and the mandate has long since issued. Familiarity with these decisions is assumed.

We appear to have jurisdiction to deny a petition for rehearing where the mandate has issued. See United States v DiLapi, 651 F.2d 140, 144 n.2 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982). It would follow that we may deny a motion for an extension of time to file such a petition. We turn therefore to the merits of the motion.

The appellate rules provide a fourteen day window in which to file a petition for rehearing following a judgment "unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a). Our local rules are silent on the issue. We of course have the power to enlarge the time "by order" under Rule 40(a). See Braniff Airways, Inc. v Curtis-Wright Corp.,424 F.2d 427, 429 (2d Cir.), cert. denied, 400 U.S. 829 (1970). Typically a motion to enlarge the time is made during the fourteen-day period and before the mandate has issued. Such a motion will usually cite the workload of counsel or the need to consult parties or other counsel with regard to whether a petition should be filed as a justification for granting the motion. The decision whether to grant the motion is discretionary, but

enlargement is routinely granted when the motion is made within the fourteen-day period.

The present motion is thus unusual both in time and grounds asserted. Although we have occasionally granted extensions of time under Rule 40 after the mandate has issued, see e.g., Davis v Smith, 607 F2d 534, 540 (2d Cir. 19798), we have done so only in circumstances far more compelling than those presented here. In Davis, for example, we granted an extension of time to petition for rehearing based on the Supreme Court's decision in Quern v Mandley, 436 U.S. 725 (1978), which had been rendered before the panel decision in Davis. Thus, the extension of time in Davis was predicated on a mistake of law at the time of the original decision. See also, Huddleston v Dwyer, 322 U.S. 232, 236 (1944) (per

curiam); United States v Middlebrooks, 624 F.2d 36, 37 (5th Cir. 1980) (per curiam).

Our research has revealed only one example of a grant of rehearing after an extended time. In Brenna v Federal Cartridge Corp., 174 F.2d 732 (8th Cir. 1949) (per curiam), decided in April 1949, the Eighth Circuit Court of Appeals affirmed dismissal of a complaint based solely on its decision one week earlier in United States Cartridge Co. v Powell, 174 F.2d 7118 (8th Cir. 1949). In May: 1950 the Supreme Court reversed Powell. Powell v United States Cartridge Co., 399 US 497 (1950). The appellants in Brenna then petitioned for a rehearing, and the court granted the petition. 183 F.2d 414 (8th Cir. 1950) (per curiam). In granting the petition in Brenna, the Court of Appeals made no mention of an

nlargement of time, although over a year ad passed, but went directly to the erits of the petition.

The instant matter is fundamentally ifferent from those in which we have ranted extensions of time. The motion or enlargement of time is nothing but an ttempt to reopen a final judgment ecause of a subsequent change in the aw. When we take the interest in inality of judgments, particularly those s old as the instant matter, into ccount, we perceive no persuasive reason o reopen this matter. Movants have made o showing of a manifest or intolerable njustice. Indeed, they were fully aware f the proceedings leading up to the onsent decree in question and, viewing he proceedings as a whole, it is evident hat this collateral attack was ecessitated in part by their counsel's

mistaken belief that they were parties to the class action. See Hispanic Soc'y, 806 F.2d at 1152-53.

Because of our disposition of this matter, we need not reach the question of whether the motion should have been directed to the Supreme Court, whether its affirmance of our decision is the law of the case or whether Wilks is retroactive. Denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 204-August Term, 1986

Decided December 8, 1986

Docket No. 86-7347

EVELYN MARINO, et al.,

Plaintiffs Appellants,
v.

JUAN U. ORITZ, et al,

Defendants Respondents

Before: Feinberg, Chief Judge, Winter and Mahoney, Circuit Judges.

Feinberg, Chief Judge:

This case requires an inquiry into what consitiutes a collateral attack on a consent decree. Evelyn Marino et al., appeals from a judgment of the United States District Court for the Southern District of New York, Robert L. Carter,

J., dismissing their complaint as a collateral attack on the settlement in Hispanic Society of the New York City Police Dep't v New York City police Dep't, 40 Empl. Prac. Dec. (CCH) 36,385 (S.D.N.Y. 1986). This appeal was argued at the same time as the appeal from the order in **Hispanic Society**, which has also been decided this day. Hispanic Society of the New York City Police Dep't v New York City Police Dep't, No :86-7507, slip op. at (2d Cir.). Appellants contend that their suit cannot be a collateral attack because their complaint was filed before the final order in **Hispanic Society** was entered. Because we think the district court properly viewed this action as a collateral attack on a consent decree, we affirm.

Facts

In the latter half of 1o84, the Hispanic Society of the New York City Police Department Inc. and the Guadians Association of the Police Department of the City of New York, Inc., tow groups that represent minority members of the New York City Police Department, brought Title VII suits against the Department and other City defendants alleging that the sergeant's examination given earlier that year and the promotion Eligible List based on the examination were racially discriminatory. The lawsuits were later consolidated into a single action and will be so regarded in this opinion. Although 12.3% of those taking the examination were black and 8.7% of them were Hispanic, blacks and Hispanics accounted for only 2.3% and 4.23%

respectively of th0se who scores qualified them for the Eligible List.

Three distict groups intervened in the lawsuit: the Sergeants Benevolent Association on behalf of those officers who had been provisionally appointed from the Eligible List, the Sergeants Eligibles Association on behalf of officers on the Eligible List who had not yet been promoted and various white ethnic societies and individuals for other officers not promoted. Following extensive discovery, city officials realized it would be difficult to prove that the sergeant's examination was job related and therefore, difficult to defend the examination's clear discriminatory impact. Accordingly, the two sides began serious settlement negotiations in hops of reaching an

accommodation that would alleviate the discriminatory mpact of the examination with a minimum of disruption to the Police Department.

Eventually, all the parties to the lawusit except the white ethnic socities reached a settlement. Under the agreement, all of the officers on the original Eligible List were to be promoted. In addition, a sufficient number of black and Hispanic officers were to be promoted so that each ethnic group's representatin in the new class of sergeants would approximate its representation in the entire group of those who took the examination. The accommodation was spurred by the growing need for sergeants on the plice force. The parties believed that this arrangement would eliminate the

examination's discriminatory impact while avoiding the morale and management problems that would ahave resulted had the entire examination been scrapped. The additionald black and Hispanic officers were to be added to the Eligible List in rank order of their scores on the written portion of the examination, sine it was conceded that the test did have some ranking value.

When the general terms of the settlement became clear, all the parties except the white ethnic groups stipulated that the Police Department could promote the officers left on the Eligible List and additional black and Hispanic officers in accordance witht he proposed settlement. The district court approved this interim settlement by order dated November 27, 1985. In April 1986,

the district court held a hearing on whether the proposed formal stipulation of settlémtnt was reasonable, fair and adequate ("the objector hearing")., and on June 16, 1086, issued an opinion approving the settlement ("the Consent decree").

Appellants filed the complaint in this action on December 30, 1985, after the interim settlement order in **Hispanic Society**, but before the final consent decree was entered. Pur@orting to represent a class of white police officers who were not placed on the Eligible List but who scored at least as high on the examination as the lowest scoring minority officer promoted under the interim order, appellants alleged that the proposed settlement deprived them of equal protection of the laws in

violation of the Fourteenth Amendment to the United States Constitution. Although appellants had no expectation of promotion since they had failed the examination, they demanded that they too be made sergeants. On April 29, 1986, Judge Carterr, who was also presiding over the **Hispanic Society** litigation, dismissed the complaint.

Discussion

It is well settled that collateral attacks on consent decrees entered in Title VII actions are not permitted, e.g. Prate v Freedman, 430 F.Supp. 1373 (W.D.N.Y), affd mem., 573 F.2d 1294 (2d Cir. 1977), cert denied, 436 U.S. 922 (1978); Dennison v City of Los Angeles Dep't of Water and Power, 658 F.2d 694 (9th Cir. 1981). The salutory policies underlying this rule are

familiar. Allowing the terms of a consent decree to be contested in separate lawsuits would raise the specter of inconsistent or contradictory proceedings., would promote continued uncertainty thus undermining the concept of final judgment and would violate the policy of promoting settlemtn in Title VII actions. Prate v Freedman, 430 F.Supp. at 1375; Thaggard v City of Jackson, 687 F.2d 66, 68-69; (5th Cir. 1982), cert. denied sub nom., Ashley v City of Jackson, 464 U.S. 900 (1983); Austin v County of DeKalb, Dep't of Pub. Safety, 572 F.Supp. 479,481 (N.D. Ga. 1983); O'Burn v Shapp.,70 F.R.D. 549, 552-53 (E.D., Pa.), aff'd mem. sub nom. Lutz v Shapp, 546 F.2dd 417 (3d Cir. 1976), cert denied, 430 U.S. 968 (1977). These policeis are squarely implicated in

the action before us and require that we affirm the dismissal of appellants' complaint as an impermissible collateral attack.

Admittedly, Judge Carter had not given final approval to the consent decree in **Hispanic Society** at the time he dismissed the lawsuit. Yet, the **Hispanic Society** litigation had proceeded to a very significant stage. a basic settlent had been reached and an interim order that matched the terms of the ultimate consent decree had been filed. A hearing had been scheduled to determine whether the proposed settlement was reasonable, fair and adequate. Had appellants been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the **Hispanic Society** settlement would have been seriously

eroded; the settlement would have had no utility it it failed to prevent further litigation of the matter. Furthermore, since even the later acutual entry of the consent decree in **Hispanic Society** would not have decided the issue, the concept of final judgment would have been undermined. By the same token, this lawusit would have relitigated the propriety of the settlement, thus inviting conflicting results. That appellants' complaint was before the same judge who was presiding in **Hispanic Society** does not change the result. See: Black and White Children of the Pontiac School System v School Dis't, 464 F.2d 1030 (6th Cir. 1972) (per curiam). There could be no certainty that the two proceedings would continue in parallel fashion. Thus, Judge Carter was correct

deeming this suit an impermissible collateral attack on a consent decree.

Appellants' proper course, as in most cases whre collateral attacks have been dismissed, would have been to intervene in the lawsuit from which the consent decree issued. Dennison v City of Los Angeles,658 F.2d at 696; Black and White Children of the Pontiac School System v School Dist., 464 F.2d 1030. Indeed, appellees suggested precisely this couse to appellants. If intervention had been denied, the proper course would have been to appeal that denial, Burns v Board of School Comm'rs, 437 F.2d 1143 (7th Cir. 1971) (per curiam). Attempting intervention in **Hispanic Society** was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

Not only did appellants have notice of the procceings in Hispanic Society and a suggestion to intervene therein, but they actually presented their claims at the objector hearing in that case. Judge Carter considered appellants' claims, and found them to be without merit. Thus appellants had the opportunity to engage in the original lawsuit and actually presented their claims. As we have said in an analogous context, "[t]he efficient and fair administration of justice requires that litigation of an issue at some point come to an end. And for the applellant, who has had one opportunity already to contest the ... order, the time to relitigate that issue has necessarily run." Class v Norton, 505 F.2d 123, 235 (2d Cir. 1974).

Finally, the instant lawsuit is, of course, an attack on the substance of the consent decree. Appellants argue that rather than disturbing the consent decree,

they are merely requesting the court to order their promotion. Even if this relief were within the court's power to grant, it would destroy the settlement by recreating the adverse racial impact that hrought on the Hispanic Society litigation to begin with. Accordingly the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO.200 AUGUST TERM, L986

(ARGUED OCTOBER 1986 DECIDED DECEMBER 8, 1986)

DOCKET NO. 86-7507

The Hispanic Society of the New York City police Department, Inc., et al, Plaintiffs-Appellees

v.

The New York City Police Department, et al, Defendants-Appellees,

v.

Wayne Costello, et al, Appellants

Winter, Circuit Judge:

This appeal is from an order approving the settlement of a classwide claim of employment discrimination. It was argued at the same time as a companion case, **Marino v Ortiz,** no.

86-7347, slip op. at (2d Cir.), which has also been decided this day. The underlying action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 et seq. (1982), challenged a sergeans' examination administered by defendant appellee New York City Police Department ("NYCPD"). The plaintiffs alleged that the examination had a disparate impact upon black and Hispanic candidates for promotion to the position of sergeant. The settlement approved by the district court called for the successive promotion of blacks and Hispanics who had taken the examination until the alleged disparate impact was eliminated. The appellants who challenged the settlement as a violation of the fourteenth amendment are said to be police officers who did not

score high enough to be eligible for promtion bud did as well or better than the blacks and Hispanics who have been promoted pursuant to the consent decree. Because the appellants are not parties to this litigation, we dismiss their appeal.

BACKGROUND

During June, 1983 and April 1984, the NYCPD administered Civil Service Examination No. 2548 to 11,899 candidates for promotion to the rank of sergeant. After scoring the exam, the NYCPD set a cut-off point that produced a list of 1,041 police officers eligible for promotion. The racial/ethnic composition of the group taking the exam was 79.0% white, 12.3% black, and 8.7% Hispanic.

In late 1984 the Hispanic Society representing Hispanic police officers, and the Guardians Association,

representing black officer, filed separate actions in the Southern District against NYCPD and various city officials, alleging employment discrimmination in violation of Title VII and other provisions.[1] The complaints alleged that the examination had a disparate impact on black and Hispanic candidates and was no job related. Three groups were permitted to intervene in both cases as codefendants: the Sergeants Benevolent Association ("SBA"), representing over 500 officers on the eligible list who had obtained provisional appointments as sergeants; the Sergeants Eligibles Association ("SEA"), representing officers who were on the eligible list but had not received provisional appointments; and various white ethnic soiceties and other individual officers

(the "Schneider Intervenors"). On June 14, 1985, the district court certified plaintiffs in **Hispanic Society** as representatives of a class of all Hispanic candidates who had taken Examination no. 2548, pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

After discovery the parties began several months of settlment negotiations. A proposed settlement agreed to by the plaintiffs, the defendants, SEA and SBA was submitted to the district court on February 7, 1086. The settlement provided that at least 1,000 police officers on the eligible list would be promoted to sergeant. Black and Hispanic police candidates not on the list were to be added until the racial/ethnic composition of the group of newly promoted sergeants was approximately the

same as the racial/ethnic composition of the group of candidates taking the test. Additional black and Hispanic officers would be promoted in rank order on the basis of their raw scores on the technical knowledge portion of the exam.[2]

The settlement also proposed consolidation of the **Hispanic Society** and **Guardians Association** actions and the certification of three additional classes: (1) the plainiffs in **Guardians Association** as representatives of a class of all black candidates who had taken the examination; (2) SBA as the representative of a class of all officers on the eligible list who had been provisionally appointed to the rank of sergeant; and (3) SEA as the representative of all other officers on the eligible list.

The settlement was conditionally approved on February 7, 1986, and a hearing was scheduled for April 17, 1986. Notice of the proposed settlement and the hearing date was sent to all plaintiffs and intervenors, and posted in all precinct stations. The Schneider Intervenors who had not signed the proposed agreement, were the only parties to the action to oppose the settlement.

Objections were also filed by officers who were not on the original eligible list but who claimed to have received scores equal to or higher thant he black and Hispanic officers to be promoted to pursuant to the settlement. The same counsel who represents the appellants in the instant case was allowed to speak a the hearing and argued that the proposed settlement violated the

rights of such officers to equal protection of the laws. He filed a "Request for Modification" on behalf of his clients seeking to have the consent decree modified to provide that they be put on the eligible list and pomoted.

Judge Carter approved the settlement on June 16, 1986, specifically rejecting the argument made by appellats' counsel. **Hispanic Society of the New York City Police Dep't v New York City Police Dep't**, 40 Empl. Prac. Dec. (CCH) 36,385 at 43,654-55 (S.D.N.Y. 1986). The Schneider Intervenors filed notices of appeal. Approximately 350 other officers (a considerably larger group than filed objections), also filed notices of appeal. The Schneider Intervenors withdrew their appeal, however, leaving the appeal of the 350 officers as the

only remaining challenge to the settlement of the case.

DISCUSSION

Appellants, the 350 officers, argue that the settlement agreement violates the fourteenth amendment because it requires the promotion of minorities over nonminorities who achieved the same or better scores on the sergeants' examination. We cannot consider this argument on the mrits, however. Because appellants never moved to intervene in these proceedings, they are not parties to this litigation. and their appeal must be dismissed.

As a general rule, only a party of record in a lawsuit has standing to appeal from a judgment of the district court. **United States ex. rel. Louisiana v Jack,** 244 U.S. 397, 402 (1917); **Martin**

Trigona v Shiff, 702 F2d. 380, 385)2d Cir. 1983); **United States v McFaddin Express, Inc.**, 310 F.2d 799, 801 (2d Cir. 1962). Parties of record include the original parties and those who have become parties by interventioh, substitution or third party practice. 9 J. Moore, **Moore's Federal Practice** 203.06 at 3-20 (1986).

There are exceptions to this general rule, but none is relevant to the present matter. The primary exception is when the nonparty has an nterest that is affected by the trial court's judgment. E.g., **Martin Trigona v Shiff**, 702 F.2d at 385-86 (permitting nonparty trustee to appeal from order granting debtor's hagbeas corpus petition against bankruptcy judge.) See also **United States v LTV Corp.**, 746 F.2d 51, 54-54 '

NN.5-6 (D.C. Cir. 1984); 9 **Moore's Federal Practice** 203.06, at 3-23. In this case appellants were not on the oiginal eligible list, they have no right to promotion under state law and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would no be entitle to promotion. accordingly they cannot appeal from the settlement as nonparties with an interest in the order below.

Appellants claim to have standing as parties , and to that end point to a "Definition" in the settlement agreement. That definition states:

The "New York City defendants shall mean and refer to the City of New York, The New York City Police Depatment, the New York City Departmen of Personnel, and all

officers, employees or agents whether elected or appointed of the City of New York, but not including the Hispanic Society plaintiffs, the Guardianns Association plaintiffs, the intervenor defendatns or any individuals or groups represented by the Hispanic Society plaintiffs, the Guardians Association plaintiffs or the intervening defendants.

Appellants assert that they fall within this definition because they are police officers employed by the City of New York. However, the definitions in the settlementby their very terms delineate the parties to the agreement and not the parties to the litigation. For example, the settlement defines "intervenor defendants" to mean the SBA and the SEA. By appellants' logic, the Schneider Intervenors would be divested

of party status because they are not included in the definition. Yet, the Schneider Intervenors are intervenor defendants, and werre omitted from the settlement definition because they were not signatories to the settlement. Just as the settlement cannot divest a plaintiff or defendant of party status in the litigation, it cannot confer party status on a nonparty.

Further, viewed in context, the definintion of "New York City defendants" does ntot make appellants either parties to the settlement or parties defendant in their individual capacities. This provision of the settlement simply bnds them to comply with its terms in their official capacities as employees of the defendnts, and does not give them standing to raise their current

objections to the settlement as violative of their individual rights.

In **Bender v Williamsport Area School District**, 106 S.Ct. 1326 (1986), the Supreme Court rejected on jurisdictional grounds a similar attempt to appeal. In that case, high school students brought an action against a school district, members of the school board, and school administrators, challenging certain restrictions on the use of public school premises under the first amendment. The trial court found in favor of the plaintiffs, but granted no relief against any of the school board members in their individual capacities. When the school distric decided not to appeal the adverse decision, board member Youngman decided to prosecute the appeal hinmself. The Surpeme Court, acting **sua sponte**, held

that because the judgment was aginst Youngman only in his official capacity, he had no standing to appeal in his individual capacity. **Id.** at 1332 (citing **Kentucky v Graham,** 105 S.Ct. 3099,3106 n.14 (1985); **Brandon v Holt,** 105 S.Ct. 873,877 (1985)). Noreover, Youngman's statusas a board member did not "permit him to 'step in the shoes of the Board' and invoke its right to appeal." Bender, 106 S.Ct. at 1333. The Court also denied Youngman's claim that he could prosecute the appeal based on his status as a parent, stating, "Since Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that count in that capacity without first filing an appropriate motion or pleeding setting forth the claim or defense that he

desired to assert.". Id., at 1335 (footnote omitted).

The lack of jurisdiction is even more obvious in the present case, because unlike Youngman, appellants were never parties in the district court in any capacity. They were included only in the settlement agreement, along with all other employees of the City of New York, merley to ensure that they would be bound by its terms in their official capacities. See **Bender**, 106 S.Ct. at 1332; **Brandon**, 105 S.Ct. at 877 (The course of proceedings ... make(s) it abundantly clear that the action against [defendant] was in his official capacity and only in that capacity.). See also **Alexander v Todman**, 361 F.2d 744, 746 (3d Cir. 19666) ("A person who sues or is sued in his official capacity is, in

contemplation of law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual.") Appellants' argument that the settlement agreement made them parties in their individual capacities is thus without merit.

Appellants also claim that filing written objections to the settlement and appearing at the hearing gave them staus as parties to the litigation. The fact that appellants were permitted to object to the settlement in the district court did not make them parties, or enable them to appeal from the approval of the settlement. See: **United States v LTV Corp.**, 746 F.2d at 53; **Moten v Bricklayers Masons ' Plasterers International Union**, 543 F.2d 224,227

(D.C. Cir. 1976).

Appellants' predicament results from their stedfast refusal to comply with the requirements for intervention set forth in Fed. R. Civ. P.24. In dismissing the appeal in **Bender**, the Supreme Court emphasized the importance of this rule:

> Because his status as a parent was obviously different from his official status as s a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon Mr. Youngman under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" byan appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." Fed. Rule Civ. Proc. 24(a), (c). No such pleading was filed in either of the courts below. It is particularly important to observe these requiremens in cases in which the interest of the litigant

> **s in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit.**

106 S.Ct. at 1335 n.9 (emphasis added). The need for formal intervention is thus as great as the need for named plaintiffs or defendants to state a well pleaded claim or defense. See **Sanders v John nuveen 7 Co.**, 463 F.2d 1075, 1082 (7th Cir.0 (pleading that accompanies intervention motion must satisfy Fed. R. Civ. P. 7(a) so that "all parties understand the position, claims and nature of relief sought by the prospective intervenors"), Cert denied, 409 U.S. 1009 (1972); 3B **Moore's Federal Practice** 24.14.

The present appeal, however, is based on factual assertions that are nowhere set forth in sworn pleading.

Although approximately 350 appellants are named, the record contains no affidavits or other sworn allegations describing their individual status as police officers or as candidates for sergeant. (We note that a considerably smaller number filed objections to the settlement.)

Because the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book. Cf. **Kentucky Home Mutual Life Insurance Co. v Duling,** 190 F.2d 797,803 (6th Cir. 1951) (holding intervention petition insufficient under Rule 24(c) when it did not state cause of action against defendant but merely stated that intervenors had insurance under the group

policy in question0. Other individual police officers and white ethnic socities, the Schneider Intervenors, intervened as parties and vigorously pursued their interests. We perceive no reason why appellants could not have done the same.

Consequently, appellants lack standing to prosecute this appeal, and we have no jurisdiction. We therefore dismiss the appeal. We deny appellees' motion for sanctions under Fed. R. App. Pl. 38. We note, however, that any doubts as to the means by which objectors to class settlements should proceed in the future has been eliminated by this opinion.

---Footnotes

1. The case filed by the Hispanic Society was **Hispanic Society v New York**

City Police Dep't. No. 84-6628 (S.D.N.Y., filed Sept. 14, 1984) and the action filed by the Guardians Association was **Guardians Ass'n v. New York City Police Dep't,** No. 84-8504 (S.D.N.Y. filed Nov. 26, 1984). The two actions were consolidated in 1986 when the court approved the settlement. see **infra.**

2. The examination had two components, a written technical knowledge test and a video job sample test. The entire exam could not be used to rank the minority candidates because video equipment had been defective at some testing locations.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT

-Against-

THE NEW YORK CITY POLICE DEPARTMENT

84 CIV. 6628 (RLC)

Carter, District Judge

The Hispanic Society and named individuals instuted 84 Civ. 6628 (RLC) in Sepember 1084; the Guardians Association and named individuals commenced 84 Civ 8508 (RLC) in November, 1984. The defendants in both cases are the New York City Police Department, Department of Personnel and various other officials. The complaints allege that Examination #2548 for Sergeants in the Police Departmen violated Title VII

because it had disparate impact on Hispanic and black candidates taking the test and was not job related. The court granted the motions of the Sergeants' Benevolent Association ("SBA"), the Sergeants' Elegible Association ("SEA") and organizatins and individuals represented by Peter Schneider, Esq. to intervene as parties in the litigation.

On June 14, 10985, the court certified 84 Civ. 6628 as a class action under Rule 23(a) and Rule 23(b) (2), F.R.Civ P., the class consisting of all Hispanic candidates for sergeant who took Examination # 2548. The court now certifies 84 Civ. 8508 as a class action, consisting of all black candidates who took the examination. The court also certifies as a class the members of the SEA consisting of provisional Sergeants

who were promoted on or before December 28, 1984. The Rule 23(a) requirements of numerosity, typicality, and commonality of questions of law and fact, and insurance of adequate and fair reprresentation of class interests, and Rule 23 (b) (2) requirements that the defendants' action is applicable to the entire class, warranting relief for the class as a whole are met in 84 Civ 8508. As to the SEA class, it meets allrequirements of Rule 23(a) as indicated above and Rule 23 (bb) (1) (A) since the prosecution of separate actions by or against individual members of the class would create the rise of inconsistent or varying adjjudications.

Examination #2548 was The test had a technical knowledge component and a job sample component the latter of which was

administered on video. At some examination sites, technical problems interfered with the successful completion of the job sample part of the test. The defendants offered a make up job sample test in April, 1984 for those who had scored 61% correct on the technical knowledge portion of the test.

Some 11,899 candidates took the test of this group 79% were white, 12.3% were black and 8.7% were Hispanic. Defendants needed to fill approximately 1,000 openings in the Sergents ranks and established a qualifying score to secure that required number of successful candidates. Based on the examination results, defendants established a rank order eligibles list of 1,041 persons. The racial breakdown of the eligible list was 93.47% whit (973), 2.30% black (24)

and 4.23% Hispanic (44). Of the total number of persons taking the test only 8.95% were placed on the eligible list: 10.61% of the white applicants, 1.69% of the black applicants and 4.39% of the Hispanic applicants.

After the lawsuit was instituted, defendants agreed to consent not to make any permanent promotions from the eligible list pending final disposition of the case. However, interim orders were issued by the court enabling the defendants on or befoe December 28, 1984, to grant some 534 persons on the eligoible list provisional upgrading Sergeant. Among this grup were 506 (94.8%) white, 7 (1.37%) black and 21 (3.94%) Hispanic officers. Subsequently, additional interim orders were issued on November 27, 1985 which allowed the

provisional promotion of all applicants on the eligible list. Moreover, to alleviate the disparate racial and ethnic impact of the examination, a certain number of blacks and Hispanics not on the eligible list were given provisional promotion or a rank order basis. This scond group consisted of 366 white candidates, 126 black applicants and 81 Hispanic candidates. Thus, as of this date, all the white, black and Hispanic candidates who made the original eligible list hold provisional Sergeant status and approximately 100 black and 60 Hispanic police officers not on the original list were granted provisional promotion.

A shortage of Sergeants now exists on the police force. At one time there were 1400 vacancies. While the provisional appointments have helped fill

some of these vacancies, those officers in command of the police force are convicned that a larger numeber of provisional as opposed to permanent, Sergeants creates great morale and administrative problems on the police force. Currently there is a need for 2,825 police Sergeants. There are now2,431 Sergeants on he force and of this numer 1,107 are provisional appointees.

Apparantly because of the need for Sergeants with permanent rank, the defendants' concern that at trial they could not successfully carry out their burden of demonstrating Examination #2548 was job related, the atmosphere for a compromise settlement was creatted. The parties have agreed that Examination #2548 "has some psychometric utility and

that the results of the technical knowledge component of the exam can be used to rank order candidates for promotion to Wergeant so long as steps are taken to minimize or eliminate the potential discriminatory effects of the use of the exam results." Memorandum of Sergeants' benevolent Ass. at 7.

The proposed settlement provides for at least 1,000 permanent promotions to Sergeant from the eligible list developed from examination #2548. That list will be modified by adding the necessary number of black and Hispanic applicants so that the aggregate racial/ethnic composition of Sergent will be approximate to the racial/ethnic composition of the applicants who took the test. These additional applicants will be selected in rank order among

themselves based on their raw scores on the technical knowledge protion of the test.

All officers (white, black and Hispanic) on the eligible list will be promoted before any black and Hispanic officers are added to the list for promotion. Retroactive seniority in their permanent rank order will be accorded only to those Sergeants provisionally promoted on or before December 28, 1984, and to any black or Hispanic officer who would have been promoted if the terms of the proposed settlement consent decree had beeren in effect at the time fo the provisional promotions. Back pay will be granted to members of the plaintiff classes who would have been promoted at the time of the December 28, 1984 promotions if the consent decree had been

in effect.

On February 7, 1986, the proposed settlement was signed by the parties, and two of the intervening parties: the SEA and the SBA. The third group of intervenors represented by Peter Schneider did not sign the settlement agreement and at least some of that group object to it. The court gave preliminary approval to the settlement, ordered appropriate note to be sent to all members of the class, and scheduled a hearing for April 17, 1986. The notice provided that all objections to the proposed settlement were to be filed witht the court on or before April 3, 1986.

A number of objections were filed, but no objections came from any member of the two defined plaintiff classes.

Virtually all the objections have come from white officers who failed to qualify for placement on the eligible list and wo challnge the popriety of the settlement in not making provision for selecting them for promotion on the same terms as the settlement provides for the selection of blacks and Hispanics not on the eligible list for permanent promotion. At the April 17 hearing counsel for the defendants urged approval of the settlement which had been endorsed and approved bythe mayor. Class counsel, consel for SA and SEA made staements or filed memoranda urging appoval. Peter Schneider was not at the hearing. In his stead Benjamin Vinar, Esq. spoke on behalf of two individuals who had been permitted to intervene: Dennis Gallagher and Timothy McCarthy. The other

individuals whom Schneider had represented and who had been allowed to intervene apparantly no longer objected to the settlement. Viner was given until May 9, 1986, to calrify whom Schneider and he represented. As of the date of this writing, nothing has been filed giving the clear implication that the above named two individuals are the only individuals they represent who continue to object to the settlement. Ronald Podolsky, purporting to represent police officers with a mark equivalent to or higher than the beneficiaries of the settlement, spoke against the settlement.

DETERMINATION

A voluntary disposition of litigation is highly favored. **Newman v Stein,** 464 F.2d 689 (2d Cir.) cert. denied, 409 U>S> 1039 (1972). The court,

however, must satisfy itself that the settlement is fair, reasonable and adequately protects the interests of members of the class. **Marshall v Holiday Magic, Inc.**,550 F.2d 1173, 1178 (9th Cir. 1977); **Feder v Harrington**,, 58 F.R.D. 1971 (S.D.N.Y. 19720 (MacMahon, J.). In Title VII litigation voluntary settlements" [are the] preferred means of achieving Title VII's goal of eliminating employment discrimination [and] voluntary compromises of Title VII actions enjoy a presumption of validity. ...". Kirkland v New York State Department of Correctional Serices, 711 F.2d 1117, 1128-29 (2d Cir. 1983); cert denied, 465 U.S. 1005 (1984). While a court is not authorized to convert settlement proceedings into a trial on themerits, it is expected to make a

sufficient exploration of the facts and circumstances surrounding the voluntary disposition of the case to be able to make a rational determnation concerning the settlement's propriety. **Plummer v Chemical Bank**, 668 F.2d 654, 658 (2d Cir. 1982).

Roughly 31 individual police officers filed timely objections. Ten officers filed objections out of time. Two officers objected to the video protions of Exmnation #2548 and tow officers filed statements indicating a lack of objection to the setlement. Since neither the individual officeers nor the societies filing objections were either members of the plaintiff casses or represented members of the plaintiff classes, their objections need not be accorded the weight required when

objections to a proposed calss settlement came from members of the calss on whose behalf the settlement is purportedly made. **Kirkland v New York State Department of Correctional Serices, supra.** 711 F.2d at 1126. This is so because in a Title VII settlement of an employment discrimination claim, "non minorities do not have a legally protected interest in the **mere** expectation of appointment[s] which could only be made pursuant opresumptively discriminatory employment practices. ... [The legal rights of non-minorityies generally are not adversely affected by **reasonable** and **lawful** race-conscious hiring or promotional remedies ...." (emphasis in the original, citations omitted). The consent of various intervening officers and societies

therefore to the settlement are not required.

The settlement was reached through arms length negotiations. Counsel for the city, class counsel repredsenting the black and Hispanic applicants, and consel representing the SBA and SEA weere involved in negotiating the proposed settlement. Thus those responsible for protecting the general public interest, counsel for the collective bargaining representative of Sergeants on the New York City police force, counsel for the minority groups directly victimized by the disparate impact of Examination #2548, and counsel for those provisional Sergeants slated for permanent promotion negotiated and agreed upon the settlemtn terms as the best solution to accommodate the Public and individual interests

involved. the participation ofthese varied interests to the agreement brings a high dègree of credibility an validity to the settlement.

There has been no claim of collusion among the parties. There has been sufficient discovery and pretrial preparation to enable class counsel to weigh the wwisdom of agreeing to a settlement against the chances of the class prevaiing if the mater proceeded to tria. The settlement avoids a lengthy and costly and since it is supported by a representative group of police officers, including the SEA, it is likly to be accepted with good grace within the plice department than a disposition imposed by the court.

The basic dissatisfaction with the settlement comes from those who object to

race concious remedies, but in the circumstances of this case, the law provides for just such remediation. (Lirkland)at 1130. A cusory look at the statistics, with Hispanic applicants obtaining a passing rate of at less than half the rate of whites, and blacks receiving a passig rato of 1/5 that of whites, shows a prima faci adverse discriminatory impact on those two minority groups sufficient to void the test and serves as sufficient predicate for settlement based on race conscious remedies. Id. Indeed, the settlement merely provides a remedy for eliminating this disparate impact..

The settlement protects the interest of those who passed the test and were placed on the eligible list while at the same time alleviating the disparate

impast the test inflicted on :minority members. Thus the settlement takes care of those affected groups. **Patterson vNewspaper & Mail Deliverers' Union,,** 514 F.2d 767, 773 (2d Cir. 1975).

Some of the objectors allege that they too shuld benefit by the settlement and be protected since they scored as high or higher tan some minority members being selecteed for promotion prusuant to the settlement. While such personal dissatisfaction with the agreement is understandable, there has been no showing of the test's disparate racial impact on any othe the white applicants who object to not being placed on the eligible list. Hence Title VII's requirement of remediation is not brought into play. **Berkman v City of New York,,** 705 F.2d 584, 597 n.15 (2d Cir. 19830. Here the

settlemtn deals merely woith correction of the disparate impact of Examination #2548. Whether the settlement solutin is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to be added to the list and no legal basis for challenging their failure to qualify for promotion.

The settlement is approved.

IT IS SO ORDERED.

Dated: New York, New York, June 16, 1986

s/ ROBERT L. CARTER, USDJ.

Marino v Ortiz Memo Endorsement Dismissing complaint.

U.S. DIST. COURT SOUTHERN DIST. OF NY.

[Caption Omitted]

4/24/86 Motion granted. Prate v Freedman, 430 F.Supp. 1373, 1375 (WDNY), affd mem 573 F2d 1294 (2d Cir. 1977) cert denied, 436 US 922 (1978). Clerk to enter Judgment. RObert L. CARTER, USDJ.

Marino v Ortiz Judgment

U.S. DIST. COURT SOUTHERN DIST. OF NY.

[Caption and Endorsements Omitted]

Defendants having moved pursuant to Fed.R.Civ.P. 12(b) (1) and 12 (b) (6) to dismiss, and the said motion having come on before the Honorable Robert L. Carter, USDJ, and the Court threafter on April 25, 1986 having handed down its Memorandum-Endorsement granting defendant' motion and directing the clerk to enter judgment, it is ORDERED ADJUDGED AND DECREED that the complaint is hereby dismissed. Dated New York NY april 29, 1986.

Motion for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVELYN MARINO, et al.,
Plaintiffs-Appellants,

v

JUAN U. ORTIZ, et al.,
Defendants-Appellees

Ronald Podolsky, an attorney duly admitted to the court certifies as true the within under penalty of perjury:

That this is a petition for a rehearing of the within matter pursuant to FRAP 40, based upon facts which arose since this court rendered its judgment thereon The United States Supreme Court affirmed this court by a 4-4 tie. On June 12, 1989 it ruled on a case which supports Appellants. The request for a rehearing is made because the proceeding involves a question of exceptional national importance.

This court at 806 F2d 1144, affirmed the dismissal of this 42 USC 1983 case which

alleged deprivation of constitutional rights by reason of the impact of a consent decree in a litigation in the district court, between the Hispanic Society and Guardian Association of the New York City Police Department as plaintiffs and the City of New York and others as defendant, before Judge Carter. The affirmance by this court was based upon the perception of the appeals panal that there was no authority to bring an independent 42 USC 1983 action by persons aggrieved by a Title VII civil rights consent decree procured in the litigations relating to the Police Sergeant Examination. Appellants were not parties to those actions. Although appellants asserted a claim they neither intervened in those actions under FRCP Rule 24, nor were they joined under the mandatory terms of FRCP by the litigating parties or the court.

The action was one brought pursuant to 42 USC 1983 by the appellants who claimed they

were deprived of equal protection of the laws and due process of laws when persons against whom they competed in a New York City Police sergeant examination with a lower grade then they were promoted while appellants wre not considered for promotion. Those promotees were the beneficiaries of a consent decree in a suit by Hispanic Society Association before Judge Carter to which the appellants herein neither consented nor were bound.

This court adhered to a concept, previously judicially fashioned, that mandatory intervention under FRCP 24 was required in order for the appellants herein to seek redress. The contrary view, that persons who assert a claim must be made parties under FRCP 19 in order to bind them to the result was rejected.

Your affirmant appealed to and argued the case in the United States Supreme Court which rendered an equally divided 4-4 opinion at

US , (1988), thereby affirming this court. Justice Kennedy had not yet been seated and the court only had eight members. A motion for a rehearing was timely made within the strictures of the Supreme Court rules, and was denied at US . Under the Rule 52.4 of the United States Supreme Court, successive requests for rehearing will not be accepted. There appears to be, however, no impediment to the application to this court,under FRAP Rule 40 and there is ample authority for the court to extend the time to petition for rehearing under that rule..

Reasons for Granting the Rehearing

On June 12, 1989 the United States Supreme Court published the case of Martin v Wilkes, US which rejects the concept of FRCP Rule 24 mandatory intervention and affirms the requirement that persons who assert a claim which could lead to inconsistent results to an ongoing litigation must be joined in that

litigation under Rule 19 in order to make the results thereof binding on them. Absent either intervention or joinder, the aggrieved party to a consent decree settlement can bring an independent action, as the appellants did in this case. Traditionally such newly discovered matter will support a petition for a rehearing or reargument.

Here apellants contended that they were not bound by the consent decree in the Hispanic Society litigation, and could bring a collateral attack under 42 USC 1983 to vindicate their claims. It is appropriate to observe that a consent decree, by definition, binds only those who consent thereto. The clear terms of Rules 24 and 19 indicate that Rule 24 is a voluntary procedure affording a person an opportunity to intervene in some else's lawsuit, and Rule 19 imposes a mandatory requirement that persons who assert a claim which might produce an inconsistent result must

be joined by the litigating parties or the court in order to have those persons bound by the result. The decision in this court was based on a Rule 24 mandatory intervention requirement using Rule 19 "inconsistent result" language. This discrepancy was disputed by your affirmant when he argued the matter in the United States Justice Kennedy, who did not sit at the original oral argument, by the court rules, did not participate in the decision not to grant reargument. If the eight members had granted reargument he would have participated in the decision when the matter was in fact reargued.

This court has authority under FRAP 40 to issue an order enlarging the time to petition for a rehearing. There is no question that had this court had the benefit of the Martin opinion, it would have held that the independent suit of the Appellants was authorized.

In the interest of justice such enlargement should be granted. The decision of this court was affirmed by a 4-4 vote of the United States Supreme Court. In effect there was no substantive decision in that the tie vote results in a defacto non-action by the Supreme Court. Thus this court still has jurisdiction in the matter.

Moreover it would be a monumentalinjustice not to grant the petition for a rehearing. Your affirmant made every good faith effort to comply with time requirements throughout the procedures followed from the district court through the United States Supreme Court without any requests for adjournment or delay. He did this because he firmly believes in the adage that justice delayed is justice denied. Thus, for example, he interrupted a much needed vacation trip to Europe to visit relatives and flew back to attend the preargument conference and then returned to Europe. After certiorari

was granted by the United States Supreme Court, he filed his briefs well before his deadline to do so, which timely filing led to the scheduling of the argument of the case at a time when the nation was most unfortunately deprived of the ninth justice.

After the 4-4 tie vote, your affirmant timely made the motion to reargue in the United States Supreme Court, and has made this application within days of learning of the possible erroroneous holding of this court. The fact remains that had your affirmant chose to linger, delay, postpone or hug deadlines, the case would have been heard after Justice Kennedy would have been seated, which obviously would have resulted in a vindication of the appellants' position. The devotion to the strictures of practice has resulted in an injustice not contemplated by the rules.

Also in the interest of justice is the fact that some of the appellants remain in the

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position of police officer. (Others were promoted as a result of state litigation mounted by your affirmant which directed awarding of credit for 12 alternate answers to key answers to the examination). Appellants timely asserted a claim of deprivation of constitutional rights. They were not joined in the Hispanic Litigation as required by Rule 19.

This is a constitutional issue, in that the appellants who are still police officers are subject to being supervised by sergeants who scored lower on the same competitive promotional examination than they did. Equal protection of the laws is implicated here and appellants in that the appellants have not been considered as eligible for promotion.

There would appear to be no prejudice to any party to this litigation should the application for rehearing be granted. The parties could still argue their respective opposing positions on the merits at the

reargument. Great prejudice would be visited upon the appellants should the application be denied. This prejudice has been demonstrated by the Martin case.

Moreover all litigants herein as well as all members of the judiciary who participated in this case are victims of the petty and ridiculous political antics and the monumental stupidity of of a number of the members of the Senate Judiciary committee who had timely notice of Justice Powell's retirement. Instead of proceeding with all deliberate speed and purposeful urgency, they chose to cavort nimbly in the Senate chambers to the lacivious pleasings of the television camaras. This disgraceful conduct led to national discontent, and has heaped well deserved public retribution upon that body which found expression in the forced rejection of the congressional pay increase. Again the judiciary was a victim. This disgusting failure of the Senate to

timely provide the nation with a ninth member to the Supreme Court perpetrated an agonizing and mostrous injustice which can only be rectified by the common decency of granting this application.

BY REASON WEREOF the petition for a rehearing should be granted.Dated: June 15, 1989

Ronald Podolsky

Attorney for Appellants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVELYN MARINO, ET AL,*

Plaintiffs,

v.

JUAN U. ORTIZ, PERSONNEL DIRECTOR OF THE CITY OF NEW YORK, BENJAMIN WARD, POLICE COMMISSIONER OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Defendants

---

*full list of plaintiffs in petition, p. 3. Hereinafter: [Caption Omitted].

(same title COMPLAINT)

PLAINTIFFS as and for a complaint herein respectfully allege:

1. Jurisdiction is conferred by virtue of 42 USC 1983; 5th & 14th Amendments, United States Constitution; and 18 USC 1343, in that it is alleged that persons acting under color of state authority are depriving plaintiffs of Equal Protection of the Laws, as part of an established procedure.

2. At all times hereinafter mentioned the plaintiffs were and still are police officers of the New York City Police Department having attained said position by virtue of competitive examination.Said rank being the entry level civil service position.

3. At all times hereinafter

mentioned the defendant JUARN U. ORTIZ was and still is Personnel Director of The City of New York, and the Defendant BENJAMIN WARD was and still is Police Commissioner of the City of New York.

4. The rank of Sergeant, New York City Police Department is a civil service supervisory position of next higher rank than that of Police Officer, and appointment thereto is required by state law to be made by virtue of police officers taking and passing a competitive examination.

5. There are two higher ranks which are civil service and competitive, those being Lieutenant and Captain respectively, and one must first attain the rank of Sergeant in order to compete for the rank of lieutenant.

6. At all times hereinafter

mentioned the defendant ORTIZ had the authority, through his agents and employees, to prepare, promulgate, administer, grade, and certify results of competitive examinations for promotion to appointing authorities, including that for the position of Sergeant, New York City Police Department. At all relevant times hereinafter mentioned the defendant WARD was and still is the appointing authority to the position of Police Sergeant.

7. That the requirements of the New York State Constitution Article 5, Section 6 provides in relevant part that appointments and promotions in the civil service of the state and all of the civil divisions thereof shall be made according to merit and fitness to be ascertained, as far as practicable, by examination,

which, as far as practicable shall be competitive. The City of New York is a municipal corporation and a civil division of the state of New York.

8. Heretofore the defendant ORTIZ did cause an examination for Sergeant, New York City Police Department be be prepared, administered and graded, and, based upon the results thereof certain persons were determined to have passed the said examination and have by reason thereof been promoted to sergeant. Said examination was administered to various police officers including the plaintiffs in June, 1983.

9. That in developing the said examination defendant ORTIZ sought and did obtain outside assistance from a firm of experts specializing in test preparation to insure that the test was

fair.

10. That the examination consisted of two parts--technical knowledge and job sample (video viewing) questions--which were to be answered by selecting one of four possible choices as the correct answer thereto.

11. The position of sergeant is a supervisory one wherein police officers are those of lower rank who are the supervised. It is also a position opportunity of long standing expectation in advanceement into supervisory ranks, as there is a minimum service requirement which must be met as a prerequisite thereto. All plaintiffs met such prerequisite.

12. The defendants have made promotions to the position of sergeant of persons all of whom have passed the

examination, some of whom have grades equal to or lower than the grades attained by variou plaintiffs who competed with them on the same examination. Plaintiffs have not been designated by the defendant ORTIZ as having passed the said examination.

13. The 14th Amendment to the United States Constitution mandates that all persons within a state be accorded Equal protection of the Laws.

14. A candidate who has a grade equal to or higher than one who has passed the examnation has also passed that examaination.

15. The failure of the defendants to deem all persons with grades equal to or higher than the grades of those who passed that examination as also having passed it is a denial of Equal Protection

of the Laws as well as the requirement that promotions be based upon merit and fitness to be determined by competitive examinatin

16. Such plaintiffs as have a grade equal to or higher than one heretofore promoted to sergeant by virtue of the same competitive test have passed the examination and have earned the right to have their merit and fitness evaluated by the appointing authority for the same position. They have been unlawfully deprived of the opportunity to be evaluated on their said merit and fitness by reason of the determination of the defendant ORTIZ not to assign a passing grade to them. Said determination was and is arbitrary, capricious, unreasonable and unlawful, and does trammel the constitutional rights of the

plaintiffs, and said determination has been participated in by the defendant WARD or his agents and employees.

17. That the examination as developed and administered by the outside experts and the defendants was done so by acceptable standards fully compliant with requirements to avoid unfairness.

18. That in November, 1985, the defendants made certain promotions to the rank of sergeant by reason of rerating of the said examination. The rerating was justified because certain questions threin were discovereed to be not job-related. Said questions, upon information and belief, were both in the technical knowledge and job sample portions of the examination. Defendants did determine that the pass marks should be adjusted to remedy this objectively

ascertainable fact.

19. The adjusted pass mark was not equally accorded to all candidates who took the test, thereby depriving such persons, including the plaintiffs herein of Equal Protection of the Laws.

20. That the action of the defendants as aforesaid deprived those candidates who attained a mark equal to or higher than others promoted to sergeant of a legitimate and long-standing and officially encouraged expectation of equal opportunity to advance into supervisory ranks and to be evaluated on their merit and fitenss as required by the competitive standard set for civil service promotional examinations.

21. By reason of the aforesaid plaintiffs are now of lower rank than

persons promoted to sergeant and are subject to being supervised by persons whom they outscored on the competitive examination.

22. All persons heretofore promoted to sergeant by reason of the examination herein have achieved passing grades thereto, as have such plaintiffs who attained the equivalent or higher grade as those promotees.

23. By reason of the foregoing, the plaintiffs have been deprived of Equal Protection of the Laws by persons acting under color of state authority.

23. All persons within the state of New York should be treated fairly and equally. Were all persons with equivalant or higher marks than those already promoted considered to have passed the examination as required by

Equal Protection of the Laws, no prejudice to the defendants would inure as there are currently over four hundred vacancies in the rank with hundreds accruing by retirement, promotion and attrition each year. Moreover all persons considered to have passed as a result of this examination have been promoted or passed over and no current list yield from the subject examination exists, nor would anyone who competed in the examination be personally prejudiced or supplanted. Moreover the municipal respondents would save tens if not hundreds of thousands of dollars over the next two or three fiscal years by reason of not having to prepare, administer, grade, certify and defend a new examination, thereby benefitting the body politic at large, eradicating the

deprivations of constitutional rights of these plaintiffs, strengthening the concept of competitive pomotional examinations and restoring confidence and morale throughout the membership in all ranks of the New York City Police Department.

24. At present there are hundreds of vacancies in the rank of Sergeant, New York City Police Department and no subsequent examination has been given to fill them. Moreover several hundred vacancies accrue each fiscal year.

25. That heretofore defendants' highly qualified inside and outside experts determined that lower marks on the examination were appropriate. However, by misjudging the needs of the service, as evidenced by the current hundreds of vacancies currently extant

with no current list of eligibles, they raised the pass mark, yielding the latest exhausted eligible list. Had the mark stayed as originally set some of the plaintiffs herein would have passed by reason of attaining that original pass grade.

26. Persons with the equvalent or higher grade on a competitive examination than persons already promoted as having passed it, prima facia are equally or more competent to fill the position of Sergeant, New York City Police Department than those said promotees and are justly entitled to be considered by the appointing authority for promotion to the rank, by reason of constitutionally protected Equal Protection of the Laws and also by reason of the needs of the service as evidenced by the hundreds of

current and projected vacancies for which no current list of eligibles exist.

27. There currently exists a critical shortage of sergeants in the New York City Police Department and there is no current list of eligibles to fill it.

28. No person would be displaced from entitlement to be considered for promotion to sergeant, nor be reduced from sergeant to police officer were the plaintiffs herein accorded Equal Protection of the Laws respecting equavalent or higher marks attained by them on the examination which led to promotions of others with whom they competed.

29. Constitutional as well as fiscal responsibility will be demonstrated by the defendants if the plaintiffs are oaccorded Equal Protection of the Laws as

aforesaid, and many thousands of dollars of public funds would be saved if the existing hundreds of current and projected openings in the rank were filled by persons who have already demonstrated their merit and fitness to be conidered for promotion to the rank.

WHEREFORE: plaintiffs respectfully seek judgment against the defendants (1) directing that the defendant ORTIZ or his successors designate such persons who have a grade equal to or higher than a candidate on the subject sergeant examination who has heretofore been promoted to sergeant, to have passed the examination; (2) directing the defendnt WARD or his successors to utilize such designation of persons as passing the examination in his considering for promotion to now current and the next

succeeding openings in the sergeant rank until all said persons have been considered, irrespective of any limitation of time in which an eligible list would normally run; (3) staying the administering of any test for the said rank of Sergeant, New York City Police Department, or certifying the results thereof until the defendants have fully complied with the requested directions; (4) that back pay, entitlements, promotional opportunities and seniority be accorded such persons who are promoted to sergeant by reason hereof as partial damages, and (5) reasonable attorney fees for the prosecution of this action.

RONALD PODOLSKY
Attorney for Plaintiffs

Letter requesting case assignment to Judge Carter from Judge Sweet. [NYC Corporation Counsel Letterhead Omitted & Address omitted.]

January 14, 1986.

Re: Hispanic Society et alv New York City Police Dept. et al, 84 Civ 6628(RLC)

Evelyn Marino et al. v Ortiz et al, 85 Civ 10068 (RWS)

Dear Judge Carter: This office reprsents defendants in both of the above referenced actions arising out of the administration of a promotional examination for police sergeant in the New Yotrk City Police Department in june, 1983. This letter is written pursuant to Rule 15 of this Court's Rules for the Division of Business, to request that the above referenced action be transferred to you as a related action.

As you are aware, the Hispanic

Society which sought to invalidate the examination and the resulting eligibility list as violative of title VII of the Civil Rights Act of 1964, 42 USC 200-e2(a)-(d), has resulted in a proposed class wide settlement wherein minority candidates who did not pass the examination would be promoted without regardto their failure of the examination or their position on the ranked list of candidates who failed the examination. Judity Levitt, Chief, General Litigation Division, has advised me that the settlemtn shpuld be filed with the court shortly and a hearing for the purposes of consideration of objections to the proposed settlement will be scheduled thereafter. Copies of the complaints in Thhe Hispanic Society and the consolidated action entitled The Guardians Assciation, et al v The New

York City Police Department, 84 Civ. 8504 (RLC) are attached to the copy of this letter sent to Judge Robert W. Sweet.

Marino et al v Ortiz et al. served on defendants on December 30, 1985 and asigned to Judge Sweet, is merely an objection to the proposed settlement in Hispanic Society. A copy of the complaint in Marino et al v Ortiz et al is attached hereto. The marino plaintiffs are candidates for the promotional examination who have failed the examination, some of whom have examination scoores equal to or higher than those mi nority candidates who were nevertheless promoted to sergeant pursuant to the Hispanic Society litigation. marino is predicated on the U.S. Constitutiin Amendments 5 and 14, and 42 USC Sec. 1983 and collaterally attacks the proposed Hispanic Society

settlement. It seeks and injunction requiring defendant to promote the Marino plaintiffs as well and would thereafter undermine the purpose of the Hispanic Society settlement.

Marino not only arises from the same promotional examination as does Hispanic Society, but present the precise issues of law and fact that will be evaluated by the court in considering objections to the proposed settlement and in approving the consent decree. The continued assignment of Marino to Judge Sween will also ntail substantial duplication of labor in the discovery proces and the trial, and if successful, would result in inconsistent order from two judges of this Court.

For these reasons, defendants Ortiz et al. respectfully request that Marino et al v Ortiz et al be reassi gned from

Judge Sweet to Your Honor pursuant to Rule 15 of the Local Rules for he Division of Business, as a related action. Thank you for your assistance in this matter. [Endorsement omitted]

(same title Declaration in Support of motion to dismiss.)

STEVEN H. MOSENSON, An attorney admitted to the bars of the State of New York and the United State District Court, Southern District of New York declares under penalty of perjury that the following is true and correct:

1. I am an Assistant Corporation Counsel in the Office of Frederick A.O. Schwarz, jr., Corporation Counsel of the City of New york, attorney for defendants, and I make this declaration in support of the defendants' motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. A copy of the complainti in this action is annexed hereto as Exhibit 1.

2. This action is a collateral attack on the interim orders and the proposed class action settlement in an action entitled **The Hispanic Society, et al., v New York City Police Department, et al.**, index No. 984 Civ. 6629 (RLC), currently pending before this Court. The **Hispanis Society** litigation arises out of the defendants' administration of a promotional examination for Police Sergeant in 1984: the interim settlement and proposed final settlement permit promotion of a fixed quota of minorty candidates who had otherwise not received a score above the eligibility cut-off score. As is demonstrated by the accompanying memborandum of law, this Court does not have jurisdiction over the subject matter of this action and accordingly, the aciton must be

dismissed.

3, Plaintiffs' claim, predicated on 42 USC 1983 and the United States Constitution, 5th and 14th Amendments also fails to state a claim upon which relief can be granted. Plaintiffs seek to emasculate a court approved stipulation imposing reasonable minority quotas, designed to remedy the effects of alleged racial discriminatory practices in the past, by upsetting the voluntarily adopted ratios of minority promotions and recreating the racial impalance which the **Hispanic Society** settlements seeks to redress. Plaintiffs, who do no claim to be victims of discrimination by defendants' administration of the promotional examination that is the subject of the **Hispanic Society** litigation, cannot claim a right to the

remedy afforded minority candidates who were discriminated against. As the accompanying mememorandum of law demonstrates, the complaint fails to state a claim upon which relief can be granted and must be dismissed.

The Sergant's Examination and the Hispanic Society Litigation

4. In June and July, 1984, defendants adminstered Civil Service Examination No. 2548 for promotion to New York City Police Sergeant. The resulting eligibility list ranked all candidates who took and passed the examinatiion. 8.95% of all candidates, 4.39% of all Hispanic candidates and 1.62% of all black candidates passed the examination.

5. The (Hispanic Society plaintiffs

commenced an action alleging that promotion to Police Sergeant from the list of eligible candidates promulgated as a result of Examination No. 2548 wuld constitute unlawful discrimination. A copy of the **Hispanic Society** complaint is annexed hereto as Exhbit 2.

6. Various interim orders during the **Hispanic Society** litigation permitted defendants to provisionally promote candidates off the Examination No. 2548 Eligibility List. Most recently, in December 1985, provisional promotions were permitted with a quota of black and Hispanic candidates.

7. the **Hispanic Society** litigaton has resulted in a proposed classwide settlement, wherein minority candidates who did no score above the cutoff score extablished by defendants for

eligibilityfor promotion would be promoted according to the following procedures:

(a) Exhausting the elibility list coupled with permanently appointing those candidates previously provisionally appointed to police sergeant;

(b) Promoting to Sergant Hispanic police officers such that the percentage of Hispanic officers promoted eqals 8.65% of the total number of candidates promoted to sergant. This ratio is to be accomplished by lowering the examination cutoff score one score level at a time for Hispanics and rank ordering, and then promoting, Hispanic candidates until the stiplated percentage is obtained.

(c) Promoting to sergeant black police officers such that the percentage of black officers promoted equals 12.25%

of the total number of candidates promoted to sergeant. This ratio is to be accomplished by lowering the examination cut off score one score level at a time for blacks, and rank ordering, and then pomoting black candidates until the stipulated percentage is obtained.

8. The proposed Hispanic Societysettlement has not yet been approved by this Court although filing of the proposal is impending and approval expected shortly.

The Marino Complaint

9. The instant action, served on December 30, 1985, is brought by over 300 white candates who proportedly scored below the eligibility cut off score but above the score of the lowest ranking

minority who was promoted to the interim orders in **Hispanic Society.** Plaintiffs seek to lower the eligibility cut off for white candidates. Were plaintiffs to be successful, they would disrupt the voluntary adopted black and Hispanic quotas because those white officers, if eligible for promotion, may be entitled to promotions under the New york Civil Service Law. This would necessitate a further lowering of the cut off score to retun to the desired ratios.

10. The proper forum for plaintiffs' complaint is in the form of an objection to the proposed settlement. Defendants therefore respectfully request that this Court dismiss the instant action and direct plaintiffs to seek intervention in the **Hispanic Society** litigation, or to file objections to the consent decree

once proposed.

WHEREFORE it is respectfully requested that defendant's motion to dismiss the complaint in this action be granted in all respects and the defendants be awarded costs and attorney fees togetherr with such other and further relief as this court deems just and proper.

Dated: New York, N.Y. February 9, 1986.

(same title OPPOSING AFFIDAVIT)

STATE OF NEW YORK
COUNTY OF NEW YORK:ss

RONALD PODOLSKY attorney for plaintiffs being duly sworn deposes and says:

That he makes this affidavit in opposition to the motion of the defendants to dimiss the complaint herein, and in support of a cross motion for summary judgment in favor of the plaintiffs based upon the averment that there is no legitimate defense to the allegations in the complaint or to the relief sought therein.

At the outset is must be emphasized that the complaint and the papers previously submitted respecting the issue of transfer of this case from Judge Sweet to Judge Carter specify that the case is

not a Title VII racial discrimination complaint, but rather one brought on Equal Protection of the Laws. To the extent that the Consitution of the State of New York requires that promotion to supervisory ranks be based upon a showing of merit and fitness by competitive examination and such be viewed as a contractual obligation on the part of the state, then also the case has the added grounds based upon the Impairment of Contracts prohibition of the United States Constitution.

It is the plaintiffs' position that because certain questions were objectively ascertained to be not job related, the passing grade of the subject sergeants' examination was adjusted; that by reason of such adjustment certain persons were perceived by the defendants

to have demonstrated their merit and fitness and were promoted. Plaintiffs agree that such persons had indeed demonstrated their merit and fitness and were deserving of promotion; that persons with an equivalent or higher grade to one previously promoted have also objectively and competitively demonstrated their merit and fitness for the position; and that defendans acting under color of state authority are depriving plaintiffs of Equal Protection of the Laws by reason of defendants' perception that plaintiffs have not demonstrated their merit and fitness at having met the same competitive standard.

It is clear that the plaintiffs have an absolute right to seek redress of grievances in the United States District Court under Equal Protection of the Laws

and that the court has jurisdiction over the subject matter. The motion to dismiss seeks to convice the court that it is powerless to take judicial cognizance of the matter. In such a motion the allegation of the complaint are deemed to be true for the purposes of the motion only, and there is no question that the allegations spell out a violation of the constitutional requirement of Equal Protection of the Laws, and conincident thereto the Impairment of Contracts prohibition in the United States Constitution.

Defendants are attempting to avoid the necessitiy of answering the allegations of the complaint because they know full well that they are true, and are seeking to transform the case into a racial conflict. They do this by

suggesting that this is a suit by white officers against minority officers. This suggestion is untrue and the defendants know it. Defendants having access and control over the personnel folders of the plaintiffs know full well that White, Hispanic, Asian and other racial religious and gender groups are included. Members of the force who are black were not excluded and if they are not plaintiffs it is because the impact of the non job related questions has already been rectified by the defendants. To hold that the officers who benefitted by this rectification somehow have not shown their merit and fitness for the position is racially insulting to those persons. Moreover it is clear that the defendants would not permit promotions of such persons who are perceived to be not fit

for the position. Plaintiffs contend that previously promoted persons have shown their merit and fitness, and contrary to the assertions of the defendants, the plaintiffs are not seeking to undo the promotions. Plaintiffs are not mere objectors in another action, and hence the cases relied on by defendants are not controlling. The complaint is fully cognizable in the district court on its own merits.

The outrageous implications of the defendants that those previously promoted persons somehow have failed the examination and are unqualified to be promoted is belied by the fact that non job related questions apply to everyone equally. It is well known for example that the elements of a specific degree of

a crime perceived by an officer to have been committed by a suspect or the degree of the crime itself is not, and need not, be committed to memory of a sergeant. When an arrest is made the sergeant invariably looks in a book (as do lawyers and judges and police officers of higher rank) to determine the charge. The only job related REQUIREMENT that elements of a degree of a crime be specifically known and committed to memory are elements of those crimes justifying use of deadly force. As has been reported in the press the city officials including Mayor Koch and Judith Levitt, successor to Juan U. Ortiz, have stated that the examination contained many such non job related questions and hence the mark should be adjusted to reflect this fact. Moreover, the same officials indicated that the

pass mark in the first instance was set too high because of a miscalculation in the needs of the service which were much larger than projected, thereby exhausting the current list and leaving hundreds of vacancies still unfilled. The sensible approach would have been an orderly point by point lowering of the marks to the two written portions of the examination or some other method which would not deprive candidates of Equal Protection of the Laws.

It was sugested in the papers relating to transfer of the case, which papers are annexed hereto, that the non job related questions were and are objectively ascertainable and that the inappropriateness thereof was visited upon all candidates regardless of subjectively ascertainable attitudes.

The defendants did not deny that at least one such person previously promoted by reason of the pass mark adjustment possessed a masters degree, although they had ample opportunity to deny in their letter submitted in reply. Affirmant has since been informed that the individual may also be an instructor at the Police Academy teaching police science subjects. These observations further fortify the position that the non job related questions had impact across the full panoply of candidates without regard to inappropriate considerations of a subjective nature. It is probable that other beneficiaries of the adjusted grade have college degrees or credits. To think otherwise would be racially insulting.

Defendants are engaging in racially

insulting behavior if they seek to imply that those previously promoted cndidates did not in fact demonstrate their merit and their fitness for the position for which they competed. Further supportive of the proposition that those persons have passed the examination on their own merit is borne out by the letter of a Deputy Mayor of the City of New York purporting to speak for Mayor Koch and the defendant City of New York which letter is annexed hereto. The seeming change of position in defendants' motion papers is further asacerbated by the stance they now take that the redress given in the compenion case was voluntarily arrived at by the city.

Defendants have no authority to seek by this motion to rewrite the complaint of the plaintiffs and to make a racial

issue out of a pure Equal Protection of the Laws standing. The complaint is judicially cognizable as is and must stand or fall on the merits of the case. Were the relief sought in this case granted, all parties with an equivalent or higher grade would be accorded Equal Protection of the Laws and would comply with the Impairment of Contracts prohibition as well as the New York Constitutional requirement that supervisory ranks be filled by persons who have demonstrated their finess by reason of competitive objective examination. No one heretofore promoted would be demoted. Hundreds of existing vacancies would have a pool of qualified candidates from which to be filled; any perceived racial discrimination has already been rectified; no new

examination has been given nor is there any existing list which would be impinged upon; illfounded perceptions by the defendants that the plaintiffs herein are in racial or other than constitutional conflict with prior events would be disasabused; persons who outscored others on the same competitive examination would not be required to be supervised by such unless they are not promoted for other legitimate reasons; the long standing, legitimate and governmentally encouraged expectation of entry into supervisory ranks held in common by all members of the force would be honored; the monetary loss of expected pay and timely and legitimate advancement to ranks above sergeant will be exonerated; the validity of the examintion as having met the 2d Circuit admonition that outside experts

be consulted will no longer be denied by defendants who originally profesed said validity; the adjustment will be rightly viewed as an objectively ascertainable correction of the situation wherein non job related questions distorted the results of everyone respecting demonstration of merit and fitness and was not a paternalistic beneficence bestowed upon two discrete insular minorities as the defendants now seek to depict it, and, finally, it will be the right thing to do.

The defendant have confused entry level considerations with those of advancement into supervisory level considerations. Exclusion from legitimate expectation of avancement is improper governmental action both in a constitutional and in a contractual

sense. Had defendants accorded equal treatment to plaintiffs by declaring them to have demonstrated their merit and fitness to the position, defendants would not have practiced exclusion. Thereafter any discrimination, real or imagined based on past or present racial factors arguably could be a consideration used by the appointing authority with respect to timing of promotion of the various candidates, so long as such consideraton is not used as an exclusionary device respecting persons who have demonstrated equivalent or higher fitness by reason of the competitive examination.

The defendants by adjusting the mark to reflect the fact that there were objectively ascertainable non job related questions which were non job related with respet to everyone, have violated the

constitution by refusing to adjust the mark equally of all candidates who took the same examination.

The allegations of the complaint unless denied are deemed to be true. On its face the complaint states a cognizable cause of action in the district court. Moreover there appears no legitimate defense to the complaint and there has been no denial of the facts thereof. In absence of any defense presented, the court should award judgment on the complaint for the relief sought therein.

It should be noted that the complaint requests an injunction against further promotional examinations until all persons with a mark equivalent to or higher than a previously promoted person be considered by the appointing authority

for promotion. There atre currently hundreds of vacancies in the rank and the current list has been exhausted. The proper approach which would lessen the effect of the trammeling of the competitive and constitutional rights of the plaintiffs is to refrain from giving any further examinations untill this pool of qualified persons have been considered for promotion that the current and next succeeding vacancies. The persons heretofore promoted would enjoy higher seniority increments, which would impact on standing in higher ranks promotional examinations wherein seniority is a grading factor, would have salary incremental benefits, vacation pick advantage and, more importantly, will have and currently have the advantage of supervisory experience which should work

to their advantage in taking future promotional examinatins. Thus the relief sought by the plaintiffs would exonerate their constitutional and contractual expectations which they have earned, and at the same time the previously promoted candidates with an equivalent or lower grade than the plaintiffs would have had any discrimination exonerated with attendant preferential advantages respecting future career opportunities. The defendants would benefit as well by having numerically more minorities than would have originally been generated by the test as originally marked, and would save considerable expense in giving an unnecessary new sergeant examination. Moreover, by ataying any new sergeant examination those in the rank of police officer would attain more time on the job

and hence more experience as a prelude to advancement to sergeant.

BY REASON WHEREOF deponent respectfully requests that the motion of the defenants to dismiss be deneied and that the motion for judgment on the complaint be granted.

RONALD PODOLSKY

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Costello Responding Police Officers Written Submission in Hispanic Objection Hearing. USDC SDNY [caption omitted].

Submission and Argument on behalf of Responding Police Officers, the list of their names being appended hereto, as New York City Police Officers who have a grade as high as or higher than the grade of persons heretofore promoted to the rank of Sergeant, NYCPD, by reason of the same competitive examination, which Responding Police Officers have not been certified by respondents as having passed the examination. Said Responding Police Officers contend that the stipulation should be modified by directing that such Responding Police Officers with equivalent or higher grades than those previously promoted be considered to have passed the examination by reason of **Equal Protection of the Laws.** Responding Police Officers request leave to present Oral Argument at the hearing now scheduled for April 17, 1986

Responding Police Officers as and for a response herein respecting the proposed settlements allege:

1. The Responding Police Officers submit the within comments respecting the proposed settlement on the basis that they are Police Officers who have marks equivalent to or higher than beneficiaries of the settlement who have heretofore been promoted while the Responding Police Officers have been denied **Equal Protection of the Laws**, as part of an established municipal procedure. To the extent that the **New York Constitution, Art. V, Sec. 6** provides that appointments and promotions in the civil service be made according to merit and fitness to be ascertained by competitive examination, and such be viewed as a contractual obligation of the state setting forth a legitimate, long

standing and governmentally encouraged expectation of advancement into supervisory ranks, the proposed settlement is an impermissable **Impairment of the Obligations of Contracts** and violates the **United States Constitution.** The Responding Police Officers agree that the persons heretofore promoted by reason of the rerating triggered by this litigation have in fact passed the examination for sergeant. They contend that there is and was no justification to exclude the Responding Police Officers from the same rerating. The procedure was used as an exclusionary device in violation of **Equal Protection of the Laws**, rather than as a device to be used in consideration of the equally qualified group as one of, but not the only consideration upon which to promote. To the degree that the settlement orders

define defendants as all city employees, the Responding Police Officers have standing to seek modification of, object to or otherwise comment thereon.

3. To the degree that the Corporation Counsel of the City of New York purports to represent all defendants, the Responding Police Officers contend that that the Corporation Counsel has a position adverse to that of the Responding Police Officers. This conflict arises by reason of the refusal of said Corporation Counsel to insure that the legal rights of the Responding Police Officers to **Equal Protection of the Laws** be be advocated by him. Responding Police Officers competed in the same promotional examination as did the beneficiaries of the stipulation heretofore promoted, and hence are qualified to be considered for

promotion as well. Moreover the negotiations of the parties were done with the explicit intent to secretly and unreasonably arrive at a conclusion without consultation with or approval of the Responding Police Officers whom the settlement defines as being clients of or being represented by the Corporation Couunsel.

4. To the extent that they are being deprived of **Equal Protection of the Laws** as hereinafter alleged, the Responding Police Officers contend that they do not consent to such result and urge a modification to comply with constitutional requirements. **The United States Constitution is the Supreme Law of the Land,** and any requested Court order, even those under Title VII, must not violate the mandate respecting **Equal Protection of the Laws.** Nothing herein

is to be construed to be in lieu of or by way of diminution of the case of **Marino et al v Ortiz, et al,** 85 Civ 10068 (RLC), currently before this Court. The comments herein are made lest failure to timely to do so be perceived as consent to the content or impact of the settlement.

5. At all times hereinafter mentioned the Responding Police Officers were and still are members of the New York City Police Department having attained said position by virtue of competitive examination. Said rank being the entry level civil service position.

6. At all times hereinafter mentioned the defendant JUAN U. ORTIZ and his successor JUDITH LEVITT held the position of Personnel Director of The City of New York, and the Defendant BENJAMIN WARD was and still is Police

Officers Commissioner of the City of New York.

7. The rank of Sergeant, New York City Police Department is a civil service supervisory position of next higher rank than that of Police Officers Officer, and appointment thereto is required by state law to be made by virtue of Police Officers taking and passing a competitive examination. There are two higher ranks which are civil service and competitive, those being Lieutenant and Captain respectively, and one must first attain the rank of Sergeant in order to compete for the rank of lieutenant.

8. At all times hereinafter mentioned the defendant ORTIZ had the authority, through his agents and employees, to prepare, promulgate, administer, grade, and certify results of competitive examinations for promotion

to appointing authorities, including that for the position of Sergeant, New York City Police Department. At all relevant times hereinafter mentioned the defendant WARD was and still is the appointing authority to the position of Police Sergeant.

9. That the requirements of the New York State Constitution Article 5, Section 6 provides in relevant part that appointments and promotions in the civil service of the state and all of the civil divisions thereof shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable shall be competitive. The City of New York is a municipal corporation and a civil division of the state of New York.

10. Heretofore the defendant ORTIZ did cause an examination for Sergeant,

New York City Police Department be be prepared, administered and graded, and, based upon the results thereof certain persons were determined to have passed the said examination and have by reason thereof been promoted to sergeant. Said examination was administered to various Police Officers including the Responding Police Officers in June, 1983.

11. That in developing the said examination defendant ORTIZ sought and did obtain outside assistance from a firm of experts specializing in test preparation to insure that the test was fair. The Office of the New York City Corporation Counsel of which JUDITH LEVITT was a member with specific duties thereto did review the examination to insure that the said examination complied with legal requirements

12. The examination consisted of two

parts--technical knowledge and job sample (video viewing) questions--which were to be answered by selecting one of four possible choices as the correct answer thereto.

13. Originally it had been determined that 30 wrong answers on the Techincal Knowledge portion and 10 wrong on the video portion were to be passing grades defining qualified persons to be promoted to the rank of Sergeant, New York City Police Department. After the test, the defendants did cause the mark to be raised to 22 wrong on technical knowledge and seven wrong on video. This was done to create a smaller list and did thereby exclude the Responding Police Officers and others with equivalent grades from the list of passing candidates. **The result of the action was to artificially create an alleged racial disproportionate**

impact, triggering this subject lawsuit. Had the mark remained as originally set, such artificially created impact would not have occurred, and all persons who benefitted by the stipulation herein as well as the Responding Police Officers would have had a passing grade without the need for judicial intervention, and on their own competitive merits.

14. The position of sergeant is a supervisory one wherein Police Officers are those of lower rank who are the supervised. It is also a position opportunity of long standing expectation in advancement into supervisory ranks, as there is a minimum service requirement which must be met as a prerequisite thereto. All Responding Police Officers met such prerequisite.

15. The defendants have made promotions to the position of sergeant of

persons all of whom have passed the examination, some of whom have grades equal to or lower than the grades attained by various Responding Police Officers who competed with them on the same examination. The Responding Police Officers have not been designated by the defendant ORTIZ nor by his successor JUDITH LEVITT as having passed the said examination.

16. **The 14th Amendment to the United States Constitution** mandates that all persons within a state be accorded **Equal protection of the Laws.**

17. A candidate who has a grade equal to or higher than one who has passed the examination has also passed that examination.

18. If racial considerations can arguably be employed as a consideration in determining the time that a candidate

can be promoted, it can not be **the only consideration** to the exclusion of equally qualified person against whom they competed. The proposed settlement can only pass constitutional muster if all Responding Police Officers with equivalent or higher grades than those previously promoted be certified for promotional consideration as having demonstrated their merit and fitness as a result of competitive examination.

19. The refusal of the defendants to deem all Responding Police Officers with grades equivalent to or higher than the grades of those who passed that examination as also having passed it is a denial of **Equal Protection of the Laws** as well as the requirement that promotions be based upon merit and fitness to be determined by competitive examination Moreover, to the degree that

the **New York State Constitution** requires promotions to be made upon a showing of merit and fitness after competitive examination, and to the extent that this requirement be viewed as contractual in nature between the municipality and its employees, the proposed settlement would be an impermissable violation of the **Impairment of Contracts** by the state municipality which is proscribed by the **United States Constitution.**

20. Such Responding Police Officers as have a grade equal to or higher than one heretofore promoted to sergeant by virtue of the same competitive test have passed the examination and have earned the right to have their merit and fitness evaluated by the appointing authority for the same position. They have been unlawfully deprived of the opportunity to be

evaluated on their said merit and fitness by reason of the determination of the defendants ORTIZ and LEVITT not to assign a passing grade to them. Said determination was and is arbitrary, capricious, unreasonable and unlawful, and does trammel the constitutional rights of the Responding Police Officers, and said determination has been participated in by the defendant WARD or his agents and employees.

21. That the examination as developed and administered by the outside experts and the defendants was done so by acceptable standards fully compliant with requirements to avoid unfairness.

22. That in November, 1985, the defendants made certain promotions to the rank of sergeant by reason of rerating of the said examination. The rerating was justified because certain questions

threin were discovered to be not job-related. Said questions, upon information and belief, were both in the technical knowledge and job sample portions of the examination. Defendants did determine that the pass marks should be adjusted to remedy this objectively ascertainable fact.

23. The adjusted pass mark was not equally accorded to all candidates who took the test, thereby depriving Responding Police Officers herein of **Equal Protection of the Laws.** The Responding Police Officers were excluded therefrom. Many of the persons who were promoted by reason of the adjustment had college credits and at least one had a masters degree and is believed to have been an instructor in the Police Academy. The fact that he and other such persons were members of a defined insular and

discrete minority did not mean that they originally failed the examination. They experienced the same non job related impact as did the Responding Police Officers with respect to the incompetence of the defendants in drafting and marking the examination in the first instance. The defendants deprived those Responding Police Officers who attained a mark equivalent to or higher than others promoted to sergeant of a legitimate, long standing and governmentally encouraged expectation of equal opportunity of advancement into supervisory ranks and to be evaluated on their merit and fitness as required by the competitive standard set for civil service competitive examinations.

24 By reason of the aforesaid, the Responding Police Officers are now of lower rank than persons promoted to

sergeant and are subject to being supervised by persons whom they outscored on the same competitive examination, and thereby have been deprived of **Equal Protection of the Laws,** by persons acting under color of state authority.

25. All persons within the state of New York should be treated fairly and equally. Were all persons with equivalant or higher marks than those already promoted considered to have passed the examination as required by **Equal Protection of the Laws,** no prejudice to the defendants would inure as there are currently over four hundred vacancies in the rank with hundreds accruing by retirement, promotion and attrition each year. Moreover all persons considered to have passed as a result of this examination have been promoted or passed over and no current

list yield from the subject examination exists, nor would anyone who competed in the examination be personally prejudiced or supplanted. Moreover the municipal respondents would save tens if not hundreds of thousands of dollars over the next three or four fiscal years by reason of not having to prepare, administer, grade, certify and defend a new examination, thereby benefitting the body politic at large, eradicating the deprivations of constitutional rights of these Responding Police Officers, strengthening the concept of competitive pomotional examinations and restoring confidence and morale throughout the membership in all ranks of the New York City Police Department.

25. At present there are hundreds of vacancies in the rank of Sergeant, New York City Police Department and no

subsequent examination has been given to fill them. Moreover several hundred vacancies accrue each fiscal year. ALL RESPONDING POLICE OFFICERS ARE QUALIFIED TO BE CONSIDERED BY THE DEFENDANT WARD FOR PROMOTION TO SAID EXISTING AND NEXT SUCCEEDING VACANCIES, AS THEY HAVE A MARK EQUIVALENT TO OR HIGHER THAN PERSONS WITH WHOM THEY COMPETED FOR THE POSITION, AND FROM WHICH THE RESPONDING POLICE OFFICERS ARE BEING UNCONSTITUTIONALLY EXCLUDED..

26. That heretofore defendants' highly qualified inside and outside experts determined that lower marks on the examination were appropriate, as set forth in a notice annexed hereto. However, by misjudging the needs of the service, as evidenced by the current hundreds of vacancies currently extant with no current list of eligibles, they raised the pass mark, yielding the latest

exhausted eligible list. Had the mark stayed as originally set some of the Police Officers herein would have passed by reason of attaining that original pass grade.

27. Persons with the equvalent or higher grade on a competitive examination than persons already promoted as having passed it, prima facia are equally or more competent to fill the position of Sergeant, New York City Police Department than those said promotees and are justly entitled to be considered by the appointing authority for promotion to the rank, by reason of constitutionally protected Equal Protection of the Laws and also by reason of the needs of the service as evidenced by the hundreds of current and projected vacancies for which no current list of eligibles exist.

28. There currently exists a critical shortage of sergeants in the New York City Police Department and there is no

current list of eligibles to fill it.

29. No person would be displaced from entitlement to be considered for promotion to sergeant, nor be reduced from sergeant to police officer were the Police Officers herein accorded Equal Protection of the Laws respecting equavalent or higher marks attained by them on the examination which led to promotions of others with whom they competed.

30. Constitutional as well as fiscal responsibility will be demonstrated by the defendants if the Police Officers are oaccorded Equal Protection of the Laws as aforesaid, and many thousands of dollars of public funds would be saved if the existing hundreds of current and projected openings in the rank were filled by persons who have already demonstrated their merit and fitness to be conidered for promotion to the rank.

31 Annexed hereo are letters

heretofore served in marino v Ortix, supra, which are reusted to be considered bythe court. The court is requested to consider any letters which might be submitted by the individual Responding Police Officers. These papers are submitted in addtion to requested oral argument at the hearing now scheduled for April 17, 1086.

WHEREFORE it is requested that the stipulated order be modified to direct that the defendants assign a passing grade to all Responding Police Officers who attained a grade equivalent to or higher than a candidate on the subject sergeant examination who has heretofore been or will be promoted to sergeant by reason ofhis litigation, to have passed the examination; directing the defendant WARD or his successors to utilize such designtion of persons as passing the examination in his considering for promotion to now current and the next

succeeding openings in the sergeant rank untill all said persons have been considered, irrespective of any limitatation of time in which an eligible list would normally run; staying the administering of any test for the said rank of serrgent, New York City Police Department, or certifying the results thereof until the defendants have fully complied with the requested directions; (4) that back pay, entitlements, promotional opportunities and seniority be accorded such persons who are promoted to segeant by reason hereof ass partial damages, and (5) reasonable attorney fees for the Responding Police Officers, with such other relief as may appear just and proper.

Ronald Podolsky Attorney for Police Officers.

Excerpts from the hearing on the Title VII settlement in the Hispanic and Guardians' case before Carter, USDJ, April 19, 1986.

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Appearances:

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p.2 Ronald Podolsky, Attorney for Evelyn Marino.

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p.4 MR. PODOLSKY: Your Honor, I believe I have standing because I filed papers for responding police officers who are named -- who under the terms of the stipulation identified as defendants in this action, all city employees identified as defendants. These people that I represent feel that they have a position different than the Corporation

Counsel.

***

p13THE COURT: Wait a minute, I want to canvas who is speaking? You are speaking for the proponents? MS. LEVITT: For the defendant proponents, right. THE COURT: who is speaking against it? Who is speaking against?****MR. PODOLSKY: Ronald Podolsky, in opposition to a motion to dismiss Marino against Ortiz, if it is on today, and also in opposition to the settlement in Hispanic. THE COURT: All I'll hear is oppositionto the settlement. Anyone else?***.

***

p30 MR. PODOLSKY: Your Honor, Rponald Podolsky representing responding police officers who have a mark equivalent to or higher than the beneficiaries of the proposed settlement who were promoted in

November. THE COURT: but who neveless were not given the rank of sergeant? MR. PODOLSKY: That is correct your Honor. It is our position that the beneficiaries of this stipulation have in fact passed the examination and did in fact deserve to be certified to the police Commissioner as having done so. Once that has been done, we have a situation where a significant group of police officers are being supervised by people who they outscored on the same competitive examination. I have cast all of my papers in this casse and in the Marino case on the ground that such a procedure violates equal protection of the laws which is a constitutional mandate superior to Title VII. Now, Title VII is not inconsistent in this situation with equal protection of the

laws for a number of reasons. First of all, every one deemed to have been discriminated against by this examination has been promoted or otherwised passed over, if not entitled for other reasons. So the discriminationn has been dealt wth insofar as any racial impact is concerned. Secondly there is not existing list at the present time, so no one will be displaced if what my suggestion is is adopted by this court. Third, there has been no new examination given and it is our projection that no new examination can be given until at least December because of a new filing by recently qualified police officers who have put three years in since the last test. And there is a period of time for filing, a period of time for study, sponsored by the police department.

There are approximately, I believe, close to 400 vacancies right now with 30 accuruing every month and it is going to go up to 60 in June or July. We would not be here to day if the original pass mark on this examination had been left as is, period. Everbody agrees with that. And the only reason we are here was because of a possible disproportionate racial impact when the dust settled. However the City came to the conclusion that there were certain nonjob related questions and it is our position that nonjo relatedness is an objectively ascertainable fact, it impacts on everyone, regardless of race, color or creed. Tjhe same difficulty of those questions was visited upon everyone who took that examination.

THE COURT: Please,please. The

problem we have with it, don't quote me and cite me something that is not the law. you are now making an argument, but that's no the law and you are a lawyer. That makes no sense. These people were dealing with what they regarded to be the regulation and rules which they were under Title VII. You are now making an argument that's contrary to the rules of law that govern decisions under Title VII. And I can't deal with that. You are expressing a personal opinion. I can't deal with that. I have to deal with what I understand the law to be and that's what all the argument has been up to now. You are arguing that Title VII law shuldn't be what it is. I don't know. Maybe you are right. MR. PODOLSKY: I beleieve I am, our Honor. THE COURTBut I don't want to hear about

that because I have to deal with the law. unfortunately, you ar not the Second Circuit and you are not the Supreme Court of the United States to wom I have to look to for guidance.*****. p.33.

****

CONSTITUTIONAL & STATUTORY PROVISIONS

New York Constitution Art V. Sec. 6. Appointments and promotions in the civil service of the state and all civil divisions thereof, including cities and villages shall be made according to merit and fitness to be ascertained, as far as in practicable by examination which, as far as practicable, shall be competitive...

Federal Rules of Civil Procedure:

Rule 19(a) PERSONS TO BE JOINED IF FEASIBLE: A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or (ii)

leave any of the persons already parties subject to a substantial risk of incurring double multiple or otherwise inconsisten- obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party....

Rule 24(a) INTERVENTION OF RIGHT. Upon timely application any one shall be permitted to intervene in an action; (1) when a statute of the United States confers an unconditional right to intervene' or (2) when the applicant claims an interest relating to the property or transaction which is the subjec t of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interat is adequately represented by existing parties.

BEST AVAIL

42 USC 1983: Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at alw, suit in equity, or other proper proceeding for redress....

42 USC 2000e - 2(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditins, or prigileges of employment because of such indivvidual's race, color, religion, sex or national origin, or (2) to limit, segregate, or calssify his employees or applicants for

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employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.

Federal Rules of Appellate Procedure, Rule 40: Petition for Rehearing. Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument is support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the

Supreme Court, U.S.
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No. 89-1490

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EVELYN MARINO, et. al,

Petitioners,

-against-

JUAN U. ORTIZ, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 23, 1990
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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court change its long-standing rule that a litigant may not reopen a civil case after it has been litigated to a conclusion because of a subsequent change in law?

CORRECTED PARTY NAMES

The current Personnel Director of the City of New York is Douglas White. The current Police Commissioner of the City of New York is Lee Brown.

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This Court decided the underlying issues presented in this petition in Marino v. Ortiz, 484 U.S. 301 (1988) (per curiam). In Marino, an equally divided Court affirmed the Second Circuit's decision in Marino v. Ortiz, 806 F.2d 1144 (1986), which upheld the dismissal of petitioners' complaint. Petitioners had alleged that the settlement of

a Title VII lawsuit discriminated against them. The complaint was dismissed as an impermissible collateral attack on a consent decree.

In Martin v. Wilks, _ U.S._, 109 S.Ct. 2180 (1989), this Court held that collateral attacks on Title VII consent decrees were permissible. Petitioners filed a motion for an extension of time to reargue based on Martin in the Second Circuit Court of Appeals in June 1989. The Court of Appeals unanimously denied the motion by decision issued October 18, 1989. Marino v. Ortiz, 888 F.2d 12 (2d Cir. 1989). The instant petition seeks review of the Second Circuit's denial of petitioners' motion for an extension of time to file a motion for rehearing.

In its decision the Court of Appeals explained that it had only issued motions for an extension of time to petition for rehearing

based on a change of law when the law had changed while the appeal was still pending:

> Although we have occasionally granted extensions of time under Rule 40 after the mandate has issued, see, e.g., Davis v. Smith, 607 F.2d 535, 540 (2d Cir. 1978), we have done so only in circumstances far more compelling than those presented here. In Davis, for example, we granted an extension of time to petition for rehearing based on the Supreme Court's decision in Quern v. Mandley, 436 U.S. 725 (1978), which had been rendered before the panel decision in Davis. Thus, the extension of time in Davis was predicated on a mistake of law at the time of the original decision. See also, Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (per curiam); United States v. Middlebrooks, 624 F.2d 36, 37 (5th Cir. 1980) (per curiam).

888 F.2d at 12.

Because petitioners had litigated their case to a conclusion, the Court saw no ground to exercise its discretion to grant the petition.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DENIAL OF THE MOTION FOR AN ENLARGEMENT OF TIME TO PETITION FOR REHEARING WAS PROPERLY BASED ON THIS COURT'S RULE THAT A MATTER THAT HAS ALREADY BEEN LITIGATED TO A CONCLUSION MAY NOT BE REOPENED BASED ON A SUBSEQUENT CHANGE IN LAW.

This Court has long held that matters that have been litigated to a conclusion may not be relitigated based on a subsequent change in the law. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948); Huddleston v. Dwyer, 322 U.S. 232, 236 (1944): "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." Sunnen, 333 U.S. at 598.

Petitioners sought to reargue the decision in Marino based on this Court's

subsequent decision, Martin v. Wilks, 109 S.Ct. 2180 (1989), which changed the law that was applied in Marino. But since Marino had already been litigated to a conclusion, the Marino petitioners could not reopen the Marino issues based on the change in law. The res judicata effect of "a final, unappealed judgment on the merits [is not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Moitie, 452 U.S. at 398. See also 1B Moore's Federal Practice ¶0.415 at 512. But see State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 162 (1945) (stating, in dicta, that res judicata is inapplicable when there is a subsequent change in law).

When the law changes while a case is still sub judice, an appellate court must apply the law as it exists at the time the court considers the case. Huddleston, 322

U.S. at 236; Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 542-43 (1941). This rule has been applied to allow a petition for rehearing, in light of a change in law, of cases where a petition for certiorari was pending at the time the rehearing was sought. E.g. Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied, 400 U.S. 829 (1970). This case, however, was not sub judice at the time this Court decided Martin. To the contrary, this Court had issued a final judgment, affirming the Court of Appeals, and the Court of Appeals had affirmed the District Court's dismissal of petitioners' complaint. Petitioners' litigation had ended.

While petitioners suggest that the Marino decision is somehow infirm because it was decided by an equally divided Court, the decision bound petitioners "as if rendered upon the concurrence of all the

judges upon every question involved in the case." Durant v. Essex Co. 7 Wall 107, 113 (1868). Thus, petitioners could not reopen the questions decided by this Court in Marino and the Court of Appeals properly denied the petition for an extension of time to file a petition for rehearing.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 23, 1990.

Respectfully submitted,

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